CLERK'S OFFICE

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 349

MAYFLOWER FARMS, INC., APPELLANT,

vs.

CHARLES H. BALDWIN, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED AUGUST 7, 1935.

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INDEX.

	Original	Print
Record on appeal to Court of Appeals of New York	a	1
Remittitur of Court of Appeals	a	1
Order of certiorari	3	2
Notice of application for certiorari order	6	4
Petition for certiorari order	7	5
Return to order of certiorari	19	9
Exhibit 2—Application for milk dealer's license	22	11
Exhibit 1—Notice of hearing	34	18
Exhibit 3—List of stores to whom petitioner sold milk	38	20
Exhibit 6—Copy of milk bottle cap	45	21
Minutes of hearing	45	21
Caption	45	21
Testimony of Mrs. Silberman	47	22
Colloquy	77	42
Memorandum, J. W. Harnach to R. G. Blabey, July 3, 1934	81	44
Memorandum, R. G. Blabey to K. F. Fee, July 3, 1934	83	45
Memorandum, K. F. Fee to R. G. Blabey, July 7, 1934	83	45
Order denying application for license	84	46

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—7167-C

	Original	Print
Record on appeal to Court of Appeals of New York—Continued.		
Notice of appeal to Court of Appeals	88	47
Order of confirmation, Appellate Division	90	47
Affidavit of no opinion except dissenting memorandum in Appellate Division	91	48
Clerk's certificate (omitted in printing)	93	
Opinion, Hubbs, J., Court of Appeals	94	49
Dissenting opinion, Finch, J., Court of Appeals	102	56
Order on remittitur	107	61
Judgment on remittitur	109	62
Petition for appeal, assignments of error and prayer for reversal	111	63
Order allowing appeal	115	66
Bond on appeal (omitted in printing)	117	
Citation and service (" " ")	119	
Stipulation as to transcript of record	120	67
Statement of points to be relied upon and designation as to printing record	123	70

[fol. a]

IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 16th day of April, in the year of our Lord one thousand nine hundred and thirty-five, before the Judges of said Court.

Witness the Hon. Frederick E. Crane, Chief Judge, presiding. Wm. J. Armstrong, Clerk.

REMITTITUR—April 17, 1935

[fol. b] In the Matter of the Application of MAYFLOWER FARMS, INC., for a Certiorari Order vs. CHARLES H. BALDWIN, Commissioner of Agriculture and Markets of the State of New York, and ano.

Be it remembered, That on the 12th day of January, in the year of our Lord one thousand nine hundred and thirty-five, Mayflower Farms, Inc., the appellant in this cause, came here unto the Court of Appeals, by Seymour Ellenbogen, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York and another, the respondents in said cause, afterwards appeared in said Court of Appeals by Henry S. Manley, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. c] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Seymour Ellenbogen, of counsel for the appellant, and by Mr. Henry S. Manley, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

[fol. d] Stamp: Office of Albany County Clerk. Aug 5, 11:33 A. M. '35. Albany, N. Y.

Therefore, it is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, April 17, 1935.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J Armstrong, Clerk. (Seal State of New York Court of Appeals.)

[fols. 1-3] In Supreme Court of New York, Albany County

Present: Hon. Pierce H. Russell, Justice.

In the Matter of the Application of Mayflower Farms, Inc., Petitioner,

for a Certiorari Order against

Charles H. Baldwin, Commissioner of the Department of Agriculture and Markets of the State of New York, and Kenneth F. Fee, Director of the Division of Milk Control and Department of Agriculture and Markets of the State of New York, Defendants

Order of Certiorari—July 27, 1934

The Mayflower Farms, Inc., being aggrieved by a decision of the Commissioner and Director of the Division

of Milk Control of the Department of Agriculture and Markets of the State of New York, presents its petition, duly verified the 13th day of July, 1934, setting forth that [fol. 4] said decision is illegal and specifying the ground of illegality and asking for a certiorari order directed to said Department and Division and for a stay of proceedings pending the determination thereof, and after hearing Harry L. Marcus, Esq., attorney for petitioner, Herbert L. Maltinsky of counsel, in support of this application, and Henry S. Manley, Esq., attorney for defendants, Robert G. Blabey, Esq., of counsel, in opposition thereto, and due deliberation having been had, and the petitioner having shown a proper case for the granting of a certiorari order and for a stay of proceedings pending the determination thereof,

Now, upon the petition of Bertha Silberman, duly verified the 13th day of July, 1934, and on motion of Harry L. Marcus, attorney for petitioner, it is

Ordered that Charles H. Baldwin, Commissioner of the Department of Agriculture and Markets of the State of New York, and Kenneth F. Fee, Director of the Division of Milk Control of said Department, produce at the office of the Clerk of the Supreme Court of the County of Albany, City of Albany, State of New York, within twenty (20) days after the service of a copy of this order, all actions and proceedings of the said Department of Agriculture and Markets and/or Division of Milk Control in the above entitled matter, with a certified or sworn copy of all petitions, appeals, applications, notices, documents, letters, affidavits or other papers before or acted upon by said De- [fol. 5] partment or Division, together with certified or sworn copies of all resolutions, determinations, decisions and opinions of the said Department or Division, with the minutes of all inspections, examinations and hearings and such other facts as may be pertinent and material to show the ground of the decision in the aforesaid matter; and it is further

Ordered that a copy of the said return be served upon the attorney for the petitioner, at his office, No. 50 Court Street, Brooklyn, New York, within twenty (20) days from the date of the service of a copy of this order upon the defendants; and it appearing to my satisfaction that irreparable damage will result if the Department of Agriculture

and Markets or the Division of Milk Control should execute or take action to enforce its order dated July 9th, 1934, and before a determination of this Certiorari proceeding can be had, it is further

Ordered that during the pendency and until the final determination of this order of certiorari the defendants, their agents, servants or employees are stayed and restrained from instituting any proceeding or bringing any action to execute, carry out or enforce its order dated July 9th, 1934, upon the condition that all papers in this certiorari proceeding be perfected and the matter be placed on the September calendar of the Appellate Division; if [fol. 6] the foregoing condition is not complied with then the stay granted herein shall be vacated.

Enter.

Pierce H. Russell, J. S. C.

In Supreme Court of New York, County of Albany

[Title omitted]

Notice of Application for Certiorari Order

Sir:

Please take notice that upon the annexed petition of Bertha Silberman, duly verified the 13th day of July, 1934, [fol. 7] the undersigned will move at a Special Term of the Supreme Court, County of Albany, to be held at the Court House thereof, on the 27th day of July, 1934, at 10:00 A. M. of that day, or as soon thereafter as counsel can be heard, for an order of certiorari directed to the above named defendants together with a stay of all proceedings pending the hearing and determination of the application and petition, and for such other, further and different relief as to the Court may seem just and proper in the premises.

Dated July 13th, 1934.

Harry L. Marcus, Attorney for Petitioner, Office and P. O. Address, 50 Court Street, Borough of Brooklyn, City of New York.

To Henry S. Manley, Esq., Counsel to the Department of Agriculture and Markets, Albany, N. Y.

IN SUPREME COURT OF NEW YORK

[Same title]

PETITION OF MAYFLOWER FARMS, INC., FOR CERTIORARI ORDER

To the Supreme Court of the State of New York:

The petition of Mayflower Farms, Inc., by Bertha Silberman, its president, respectfully shows this Court and alleges:

[fol. 8] First. That at all times hereinafter mentioned, Mayflower Farms, Inc., was and still is a domestic corporation, incorporated under the Laws of the State of New York, and having its office and principal place of business in the Borough of Brooklyn, City of New York.

Second. That pursuant to Chapter 158 of the Laws of 1933, entitled Article 25, the petitioner applied for a license from the Department of Agriculture and Markets, Milk Control Board, to conduct its milk business in the City of New York.

Third. That on or about September 6th, 1933, a license bearing number 3016 was duly issued to the petitioner permitting and enabling the Mayflower Farms, Inc., to conduct its business within the City and State of New York.

Fourth. That pursuant to Chapter 126 of the Laws of the State of New York, effective April 1st, 1934, an amendment to Article 21 of the Agriculture and Markets Law was enacted by the Legislature of the State of New York and duly approved by the Governor of the said State, creating a Division of Milk Control, headed by a director to be appointed by the Commissioner of Agriculture and Markets and to serve during his pleasure.

Fifth. That upon information and belief, the Commissioner of Agriculture and Markets of the State of New York is Charles H. Baldwin.

[fol. 9] Sixth. That in pursuance of the foregoing enactment and amendment, Kenneth F. Fee, was duly appointed as Director of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York.

Seventh. That in accordance with Section 258 of Chapter 126 of the Laws of 1934, the Mayflower Farms, Inc., duly made application for a milk dealer's license and duly paid the license fee required therefor.

Eighth. That the Mayflower Farms, Inc., has duly complied with all the rules, regulations and sections of the Agriculture and Markets Law required by a milk dealer as a prerequisite to the granting to it of a license by the Division of Milk Control.

Ninth. That pursuant to Section 258 C of Chapter 126 of the Laws of 1934, the Commissioner of the Department of Agriculture and Markets may decline to grant a license or may suspend or revoke a license already granted upon due notice and opportunity of hearing to the applicant when satisfied of the existence of any of the conditions enumerated in paragraphs "A" to "M" of Section 258 C.

Tenth. That at no time has Mayflower Farms, Inc., been guilty of any of the conduct enumerated in paragraphs "A" to "M" of Section 258 C of chapter 126 of the Laws of 1934.

[fol. 10] Eleventh. That on or about the 13th day of June, 1934, the Mayflower Farms, Inc., received a notice requesting it to appear before the Commissioner of Agriculture and Markets in respect to its application for a license for the year ending March 31st, 1935, pursuant to Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934).

Twelfth. That on or about the 18th day of June, 1934, a representative of Mayflower Farms, Inc., who was familiar with the business of the Company, appeared before the said Commissioner in response to the aforementioned notice.

Thirteenth. That the aforementioned notice failed to properly advise the petitioner of any particular or specific charge against it nor was any particular or specific charge alleged against the said petitioner at any time during the said hearing.

Fourteenth: That at said hearing a general examination of the president of the petitioner was had without regard

to the notice and without regard to the Constitutional rights and privileges of the petitioner.

Fifteenth. That at no time during the entire hearing was a specific violation of any of the sub-divisions "A" to "M" of Section 258 C made against Mayflower Farms, Inc.

[fol. 11] Sixteenth. That on or about the 10th day of July, 1934, an order was served upon the Mayflower Farms, Inc., denying its application for a milk dealer's license.

Seventeenth. That nowhere in the said order nor at any time during the alleged hearing was there any ground or charge made against the petitioner, nor was there any reason given for the denial of its application for a license.

Eighteenth. That upon information and belief, and solely from the reading of the alleged notice, a possible alleged charge might be that the petitioner was selling milk in New York City at the "unadvertised Brand Price", in violation of the Rules and Orders of the Division of Milk Control.

Nineteenth. That if such be the charge, then such alleged charge is false and untrue in respect to the alleged violation by the petitioner of the price fixing orders of the Division.

Twentieth. That the Mayflower Farms, Inc., at no time sold any other milk but "unadvertised" milk.

Twenty-first. That the attempt on the part of the Division of Milk Control to compel the Mayflower Farms, Inc., to sell its product for more than its competitors selling the same product at the "unadvertised price" is unjust, improper, illegal and unconstitutional.

[fol. 12] Twenty-second. That Section 258 Q of Chapter 126 of the Laws of 1934, under which the Division of Milk Control purports to act, has not application to the creation of the Division of Milk Control, is illegal, unconstitutional, unjust and prejudicial and in violation of Article I, Section VI, of the Constitution of the State of New York, and in violation of the Constitution of the United States, in that said Section, if it be enforced, deprives Mayflower Farms, Inc., of the right to engage in the milk business and limits the right to engage in the milk business to a particular class.

Twenty-third. That the action of the Division of Milk Control and the Department of Agriculture and Markets in denying the petitioner's application for a milk dealer's license is erroneous, improper, illegal, unjust, capricious, prejudicial and unconstitutional, and, if the said denial is permitted to stand, same will create undue and unnecessary hardship to Mayflower Farms, Inc., and will result in destroying its business and good will and depriving it of its property and business without due process of law and in violation of the Federal and State constitution.

Twenty-fourth. That pursuant to Section 258 D of Article 21, Chapter 126 of the Laws of 1934, the action of the Commissioner in refusing to grant or renew a license or in revoking or suspending a license, may be reviewed by Certiorari in the manner provided by the Civil Practice Act.

[fol. 13] Twenty-fifth. That no previous application for an order of certiorari has been made nor has any application been heretofore made to stay the order of the Division of Milk Control from taking effect and until the hearing and determination of the application herein.

Twenty-sixth. That thirty (30) days have not elapsed since the order of the Division of Milk Control hereinabove set forth was made, or since due notice thereof was given to Mayflower Farms, Inc.

Twenty-seventh. That unless a stay of the order aforementioned is granted during the pendency of this application, Mayflower Farms, Inc., will be unable to conduct business legally within the State of New York, and irreparable damage will be done to said Mayflower Farms, Inc., because of the loss of business in confiscation of its property as a result thereof.

Wherefore, petitioner prays for an order of certiorari, directed to the Commissioner of Agriculture and Markets and to the Director of the Division of Milk Control of the State of New York, requiring the return to this Court of all actions and proceedings of the said Department of Agriculture and Markets and/or Division of Milk Control in the above entitled matter; with a certified or sworn copy of all petitions, appeals, applications, notices, documents, letters, affidavits or other papers before or acted upon by said De-

[fols. 14-18] partment or division, together with certified or sworn copies of all resolutions, determinations, decisions and opinions of the said Department or Division, with the minutes of all inspections, examinations and hearings and such other facts as may be pertinent and material to show the ground of the decision in the aforesaid matter and petitioner further prays for an order staying the Department of Agriculture and Markets and the Division of Milk Control during the pendency of this application and the determination thereof, from bringing any action or proceeding to enforce its order dated July 9th, 1934.

Dated July 13th, 1934.

Mayflower Farms, Inc., by Bertha Silberman, Petitioner.

[fol. 19] IN SUPREME COURT OF NEW YORK

[Same title]

RETURN TO ORDER OF CERTIORARI

The above named Commissioner of Agriculture and Markets and Director of the Division of Milk Control, the respondents herein, for a return to an order of certiorari heretofore granted and to the petition upon which the same was granted, respectfully make return thereto as follows:

I. Respondents deny each and every conclusion of law and of fact in said petition contained and submit the same to the Court.

[fol. 20] II. Respondents do hereby certify and return that the following constitute "all actions and proceedings of the said Department of Agriculture and Markets and/or the Division of Milk Control in the above entitled matter," with a certified or sworn copy of all petitions, applications, notices, documents, letters, affidavits or other papers acted upon, together with certified or sworn copies of all resolutions, determinations, decisions and opinions of said department, as well as exhibits and testimony, and such other facts as may be pertinent and material to show the ground of the decision in said matter.

1. Application of petitioner for a milk dealer's license pursuant to the provisions of Article 21 of the Agriculture

and Markets Law (Chapter 126 of the Laws of 1934). (Exhibit 2 on the hearing held on said application on the 18th day of June, 1934).

2. Notice of hearing addressed to Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, New York, together with return receipt of the United States Post Office Department showing delivery of said notice (Exhibit 1 on said hearing of June 18, 1934).

3. List of grocery stores to whom petitioner sold milk (Exhibit 3 on said hearing of June 18, 1934).

4. Copy of official order of the Milk Control Board dated November 22, 1933, in the matter of the revocation of license issued to Mayflower Farms, Inc., under Article 25 of the [fol. 21] Agriculture and Markets Law (Chapter 158 of the Laws of 1933 (Exhibit 4 on said hearing of June 18, 1934).

5. Copy of order of the Appellate Division, Third Department, dismissing petitioner's appeal from said official order of the Milk Control Board dated November 22, 1933 (Exhibit 5 on said hearing of June 18, 1934).

6. Copy of milk bottle cap made Exhibit 6 on said hearing of June 18, 1934.

7. Transcription of the minutes of hearing held June 18, 1934, on petitioner's application for license pursuant to the provisions of Article 21 of the Agriculture and Markets Law for the license year ending March 31, 1935.

8. Memorandum of J. W. Harnach to Assistant Counsel Robert G. Blabey, dated July 3, 1934.

9. Memorandum of Assistant Counsel Robert G. Blabey to Director Kenneth F. Fee under date of July 3, 1934.

10. Memorandum of Director Kenneth F. Fee to Assistant Counsel Robert G. Blabey under date of July 7, 1934.

11. Official order denying petitioner's application for license, dated the 9th day of July, 1934.

In witness whereof, the respondents have hereunto af- [fol. 22] fixed their signature and the seal of the said Division of Milk Control this 22nd day of August, 1934.

Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York. Kenneth F. Fee, Director of the Division of Milk Control. (Seal.)

EXHIBIT NO. 2 ANNEXED TO RETURN

June 18, 1934

(Copy)

Application for a Milk Dealer's License

(Article 21 of the Agriculture and Markets Law)
(Chapter 126 of the Laws of 1934)

(Approved)

To the Commissioner of Agriculture and Markets, Albany, N. Y.:

The undersigned hereby applies for a license to purchase, handle, sell or distribute milk, pursuant to the provisions of Article 21 of the Agriculture and Markets Law, [fol. 23] for the period ending March 31, 193–, and in support of such application makes the following statements and answers to questions:

1. Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, New York. 58. (See that name and address of applicant is correctly stated.)

2. Were you, on January 1, 1933, doing business as a milk dealer under the name given above? No. If not, when did you commence doing business as a milk dealer under that name? Sept., 1933. Is the applicant successor in business to any other person or corporation? No. If so, state name of such person or corporation. ——.

3 (a). If applicant is an individual—Full name, —— ——; age, —; residence address (street and number, city and state): ——.

3 (b). If applicant is a partnership—Full names of all partners: ——; post office address (street and number, city and state); ——; age, —.

3 (c). If applicant is a corporation—In what State incorporated. N. Y. When incorporated? 1933. Principal [fol. 24] office, 80 Vernon Ave., B'klyn, N. Y. Authorized capital, 200 shares no par value. Capital paid in cash, $3,475.00.

Full name of	Post office address (Street and number, city and State)	Date of taking office
President: Bertha Silberman	691 Madison St., B'klyn, N. Y.	Immed.
Secretary: Benj. Reiss	433 Pulaski St., B'klyn, N. Y.	"

Directors: Above.

4. Do you purchase milk from (a) milk producers? No. (b) Any cooperative association? No. (c) Any other dealer? Yes.

5. Do you keep cows for the production of milk? No. If so, how many? ——.

6. From how many producers do you buy milk? None.

7. Do you now hold an unrevoked license from the Department under Article 21, entitling you to purchase milk from producers? No.

8. Have you filed a bond with the Department for the period ending August 31, 1934? No. If so, what is the amount of such bond? ——.

9. Location of every plant or station in New York State where milk or cream is received from producers, and name of manager in charge. (List plants—not producers. Attach additional paper if necessary.)

[fol. 25]

Name by which plant is known	Post office address of plant	County	Name of plant manager
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

10. Give below the name of each milk dealer or cooperative association from whom you are purchasing milk or cream. (Attach additional paper if necessary.)

Name: Supreme Milk Co.

Address: Perth Amboy, N. J.

Commodity purchased	Approx. daily amount	Price paid per cwt.
Bulk	200 qts.	Control Board
Bottle	900 "	"
H C	24 "	

11. Give below the name of each city and village where you sell milk.

Name of City: N. Y.
Permit from Health Officer (Yes or No): Yes.
Health Officer's Name: Dr. Rice.
Date Permit expires: Sept. 1934.

12. What disposition is to be made of the milk or cream purchased? (a) Resold, Yes. (b) Manufactured, No.

13. The maximum amount of milk received or handled in any calendar month since April 1, 1933 (exclusive of the amount used by the applicant for manufacturing milk products other than cream, condensed or concentrated milk not [fol. 26] packed in hermetically sealed cans, and exclusive of milk received outside of the State of New York and not distributed or sold within the State of New York) was received during the month of: March, 1934.

14. The following is a detailed statement of the milk, cream and condensed milk received during the month just mentioned:

(a) Fluid milk received from producers	..... lbs.
(b) Fluid milk of own production	..... lbs.
(c) Fluid milk received from dealers	43,775 lbs.
(d) Cream from producers, —— lbs. Average fat, —%. Milk equiv.	..... lbs.
(e) Cream from dealers, 536 lbs. Average fat, 40%. Milk equiv.	5,360 lbs.
(f) Condensed from dealers, —— lbs. Average fat, —%. Milk equiv.	..... lbs.
(g) Total received (in terms of milk)	49,135 lbs.
(h) Milk used for fluid milk, cream and bulk condensed and evaporated milk	.....
(i) Milk used for all other purposes	.....
(j) Milk received outside the State of New York and not delivered or sold in the state	.....
(k) Total of the two foregoing items	49,135
(l) Difference [item (g) less than item (k)]	.....
(m) Average daily amount of Item (l)	1,585

15. State experience of applicant (or of its officers, if a corporation) which qualify applicant to conduct business, giving names of concerns previously associated with. Max Silberman, Manager, formerly one of the officers of Silberman Dairy Co., Inc.

[fol. 27] (Dealers who produce all the milk which they sell need not answer quettions 16 to 32 inclusive)

16. Bank references as to the character and financial responsibility of the applicant. Banks—
Name: Mfg. Trust Co.
Town: B'klyn, N. Y.
Number and Street: 774 B'way, B'klyn, N. Y.

17. Other references—

Name	Town	No. and street	Business
Supreme Milk Co.	P. A. N. J.	....	Milk and Cream
Keimer Williams	Richmond Hill, N. J.	....	Cars and Boxes

18. The following statement must be brought to date and dated.

Financial Statement of Assets and Liabilities of Applicant as of Apr. 1, 1934

Assets

Cash on hand	$104.98
Cash in bank	1,107.90
Accounts owing by customers, good and collectible, not pledged or sold as per Schedule A	110.22
[fol. 28] Merchandise (not on consignment or conditional sale): How valued: Cost	9.24
Deposits	50.00
Total Quick Assets	1,382.34
[Machinery:]* (Cost, $——. Improvs., —— Depreciated (Deduct) ——)	211.78
Fixtures and other Equipment: (Cost, $—— Depreciated, $——)	202.92
Total Assets	

Liabilities

For Merchandise: Accounts owing, not due, as per Schedule A	941.31
Total Quick Liabilities	941.31
Other liabilities: (Describe) Res. for Depr.	358.37
Total Liabilities	1,299.68
Capital Stock Preferred	
Common	4,205.00

Net Worth

[Surplus and Undivided Profits]* Defic.	1,015.70
Total	4,488.98

Schedule A

State nature of accounts, how long outstanding, and if disputed, so state.

[fol. 29] Accounts Receivable

All good.

State nature of accounts and how long outstanding.

Accounts Payable

None Past Due.

19. Insurance on Merchandise, $——. On buildings, $——.

20. Net profit or loss last fiscal year (state which): $1,493.83.

21. Is the financial condition of the applicant, at the date of making this application, as good as indicated by the statement above? Yes.

22. The applicant are/is worth the net sum of Thirty-One Hundred Eighty-Nine dollars ($3,189.30).

[*Words and figures enclosed in brackets erased in copy.]

23. Is the applicant surety or endorser upon any bond, note, or other obligation, not included in foregoing statement of liabilities? If so, give names and amounts. No.

24. Has judgment been entered against applicant, upon which execution has been returned unsatisfied? No.

25. Is any suit, action or proceeding pending against applicant, which relates directly or indirectly to any pur-
[fol. 30] chase of milk or cream by such applicant? If so, state plaintiff's name and residence and the nature of such action or proceeding and the full title thereof. No.

26. Has applicant ever been convicted of a crime? No. If so, when, where, and in what Court, and what was the nature of the crime? ——.

27. The maximum value of the milk and cream that will be purchased by applicant from producers of milk in any one month during the license year ending March 31, 19—, is estimated at —— dollars ($——) and it is believed that such maximum will be purchased during the month of ——, 19—.

28. The maximum amount paid out by applicant to producers of mill and cream in any one month during the year immediately prior to making this application was . . . . None . . . . dollars ($——), and was paid during the month of ——, 19—.

29. The total value of milk and cream purchased by applicant from producers during the year immediately prior to the date of application was . . . . None . . . . dollars ($——).

30. On what days are payments regularly made for milk and cream? ——. Date, ——.

[fol. 31] 31. What periods of delivery are covered by payments made on each of the days listed in Item 24? ——.

32. Are any payments now past due? ——. If so, state amount and reasons, ——.

33. Do you agree not to buy milk or cream from or sell milk or cream to any unlicensed milk dealer in New York State? Yes.

34. Did you comply with all rules, price fixing orders and other orders of the Milk Control Board? Yes.

35. Do you agree to comply with all rules, price fixing orders and other orders hereafter made by the Commissioner? Yes.

36. Will the applicant handle any milk or cream produced elsewhere than in the State of New York? Yes.

(If this question is answered in the negative, Questions 37 and 38 need not be answered)

37. Do you agree not to sell within New York State, after it has come to rest within the State, milk or cream purchased from producers without the State at a price lower than that required to be paid producers for milk or cream produced within the State purchased under similar conditions? ——.

38. Do you agree that you will obtain for the Commissioner and supply to him, at such times and in such manner as he requires, concerning milk and cream produced with-
[fol. 32] out the State and in any way dealt in by you, data to whatever extent is necessary to ascertain or compute whether the producers were paid for such milk or cream a price not lower than that required to be paid producers for milk or cream produced within New York State and purchased under similar conditions? ——.

39. Has the applicant, or any milk dealer with which the applicant or any official thereof is connected, been notified to appear at a hearing before the Milk Control Board since April 10, 1933? Yes.

40. There is presented herewith a license fee in the sum of $25.00 in the form a check—money order. (Cross out term which does not apply.)

(Note: All license fees must be in the form of check or money order made payable to the Commissioner of Agriculture and Markets. Do not send cash.)

41. The applicant hereby represents that the statements made in this application and in the schedules accompanying it, which schedules are hereby made a part of this application, are true and correct.

Dated at B'klyn, N. Y., this 1 day of ——, 19—.

Application must be signed here: (Name of Applicant:) Mayflower Farms, Inc., by Bertha Silberman.

[fol. 33] Note: If co-partnership, firm name must be signed and each member must sign individually as well. If corporation, corporate name must be signed in full, with the officer's name and title on line below. Corporate seal must be impressed.

Execution of this application must always be acknowledged before a notary public or other officer authorized to take acknowledgments.

[fol. 34] EXHIBIT NO. 1—ANNEXED TO RETURN

June 18, 1934

(Copy)

State of New York

Department of Agriculture and Markets

Division of Milk Control

To Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, New York:

You are hereby directed to appear before the Commissioner of Agriculture and Markets of the State of New York at the offices of the Division of Milk Control of the Department of Agriculture and Markets on the 20th Floor of the State Office Building in the City of Albany, New York on the 18th day of June, 1934, at ten o'clock in the forenoon of that day, at which time and place you will be given an opportunity to be heard as to whether or not a license for the license year ending March 31, 1935, shall issue to you pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934).

You will be examined with respect to:

(1) The officers and directors of the Corporation and the power of control therein.

(2) The date of and the occasion that the present officers and directors took over the control of the applicant.

[fol. 35] (3) The business operations of the applicant since April 10, 1933, and more particularly with reference

to the revocation of license issued to said Corporation pursuant to the then Milk Control Law (Chapter 158 of the Laws of 1933), which said order was issued by the Milk Control Board on or about November 22, 1933, effective December 1, 1933.

(4) The sale of milk by you to stores at one cent below the minimum as fixed by the official orders of the Milk Control Board and that the Commissioner of Agriculture and Markets, or what is known to the trade in New York City as the "Unadvertised brand price."

It is further alleged that you have continued in a course of dealing of such a nature as to satisfy the Commissioner of your inability or unwillingness to properly conduct the business of receiving or selling milk;

That the sale of milk as aforesaid was in violation of said Article 25 and the official orders of the Commissioner duly enacted;

That you have since September 1, 1933, operated without a milk dealer's license in violation of former Article 25 of the Agriculture and Markets Law (Chapter 158 of the Laws of 1933) and the present Article 21 of that Law (Chapter 126 of the Laws of 1934).

[fols. 36 & 37] You are further directed to produce at said hearing, as hereinabove mentioned, any and all milk sheets, statements, papers, records and documents relevant to the allegations herein made, and

Take notice that it will be impossible to grant an adjournment except for extraordinary circumstances and in case of your failure to appear and answer, a determination will be made by default.

Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York; Kenneth F. Fee, Director, Division of Milk Control. (Seal.)

Dated and sealed at the City of Albany, New York, this 12th day of June, 1934.

[fol. 38] EXHIBIT No. 3.—ANNEXED TO RETURN

June 18, 1934

(Copy)

April 16, 1934.

To the Division of Milk Control, Albany, N. Y.:

The following is a list of stores (hotels or restaurants selling milk consumed on premises only not included) supplied with milk and/or cream by the undersigned milk dealer in the counties north of Rockland and Westchester.

Name of Dealer: Mayflower Farms, Inc.,

Address of Dealer: 80 Vernon Ave., B'klyn, N. Y.

Name of store operator (Write plainly)	Address			Daily deliveries	
	No. Street	City	Co.	Milk qts.	Cream qts.
Astir Holding Corporation	607 De Kalb Ave	B'klyn	Kings	40	3
E. Barden	766 Lafayette Ave	"	"	12	3
J. Bettina	66 Central Ave	"	"	24	2
B. Bitel	185 Green St	"	"	36	..
M. Blunstein	768 DeKalb Ave	"	"	24	..
C. Chafetz	253 Stockton	"	"	24	..
M. Chessner	340 Rodney St	"	"	12	..
A. Daniello	155 Lorimer St	"	"	18	..
DeKalb Coffee Pot Inc	835 DeKalb	"	"	80	1
Darshin	406 Lorimer	"	"	6	..
Dragon	81 Nostrand Ave	"	"	12	..
L. Taxon	356 Central	"	"	36	..
Gazinger	144 Roebling St	"	"	18	..
H. Glass	52 Bartlett St	"	"	24	..
S. Green	325 Manhattan Ave	"	"	24	..
H. Goldman	628 Wythe Ave	"	"	12	1
D. Ginet	16 Stagg St	"	"	6	..
P. Goldman	756 Myrtle	"	"	6	1
D. Kracov	43 Tompkins	"	"	12	..
J. Krizizlivski	157 Driggs	"	"	24	..
N. Kilchoaski	195 Green St	"	"	12	..

[fols. 39-44]

H. Koffler	63 Barlett	B'klyn	Kings	36	..
H. Larowitz	286 Pulaski	"	"	48	1
T. J. Lazaridio	6 Howard	"	"	40	1
S. London	208 Reid	"	"	24	..
H. Lukowski	234 Metropolitan	"	"	18	..
M. Mendelson	35 Howard	"	"	12	..
S. Millet	259 Nostrand	"	"	36	3
Nicar Restaurant Inc	894 Myrtle	"	"	40	1
S. Oser	22 Rockaway	"	"	24	..
F. Palma	218 No. 6th	"	"	12	..
Roth & Schalitz	338 Tompkins	"	"	24	..
Wm. Rosamyer	506 Wilson	"	"	6	..
Robertson	360 Central	"	"	24	..
I. Rubin	249 Ralph	"	"	12	..

Name of store operator (Write plainly)	No. Street	Address City	Address Co.	Daily deliveries Milk qts.	Daily deliveries Cream qts.
F. Sarnowski	26 Oakland	"	"	36	1
Shluker & Adelman	855 De Kalb	"	"	6	1
Steiner Bros	20 Central	"	"	60	..
R. Stufman	112 Ellery St	"	"	12	..
J. Weiniger	524 Graham	"	"	12	..
Wysocki & Barc	161 Grand St	"	"	12	..
W. Zurblis	104 Grand	"	"	12	..
G. Smith	745 Driggs	"	"	12	..
M. Ingwer	377 So. 2nd St	"	"	12	..
J. Zoller	367 S. 2nd	"	"	12	..
M. Trochiniki	126 Norman	"	"	24	..
H. Russak	321 Oakland	"	"	24	..
H. Krusch	175 Green St	"	"	12	..
A. Padilla	969 De Kalb	"	"	6	..
B. Lapidus	648 Central	"	"	24	..
C. Curcurato	165 Ralph	"	"	6	..
J. Hauft	43 Siegel St	"	"	24	..
M. Markel	63 Siegel St	"	"	24	..
Mary Kuc	288 Eckford	"	"	12	..

[fol. 45] EXHIBIT No. 6—ANNEXED TO RETURN

June 18, 1934

(Copy)

Puritan Dairy

Grade B Milk

Pasteurized at Perth Amboy, N. J.,

Not to be Sold After 12 Midnight, Monday

Perth Amboy, N. J.

TRANSCRIPT OF MINUTES OF HEARING HELD JUNE 18, 1934—ANNEXED TO RETURN

State of New York

Department of Agriculture and Markets

Division of Milk Control

Hearing held in the Department of Agriculture and Markets, 20th floor, State Office Building Albany, N. Y., at 2:00 P. M., June 18, 1934.

[fol. 46] This is a hearing on the Application of Mayflower Farms, Inc., No. 80 Vernon Avenue, Brooklyn, N. Y., for a Milk dealer's license pursuant to the provisions of Article 21 of the Agriculture and Markets Law.

Appearances:

For the Department:

Mr. J. W. Harnach, Director, Traffic Bureau, Presiding: Robert G. Blabey, Esq., Counsel; Mr. Andrew H. Bell.

For the Applicant:

Mrs. Bertha Silberman, President of Mayflower Farms, Inc. Harry L. Marcus, Esq., Counsel.

Mr. Blabey: Is there any question about the notice?
Mr. Marcus: No; we will stipulate that we have received proper notice of this hearing.
Mr. Blabey: This paper that you hand me is a duplicate of the original notice on this hearing, Mr. Marcus?
Mr. Marcus: Yes.
Mr. Blabey: You are here in answer to that?
Mr. Marcus: Yes.
Mr. Blabey: I offer this notice in evidence.
Mr. Harnach: It will be received and marked Exhibit No. 1.

[fol. 47] Mrs. Silberman, being duly sworn, testified as follows:

Mr. Blabey (examination of Mrs. Silberman):

Q. Mrs. Silberman, you are an officer of the Mayflower Farms, Inc.?
A. Yes, sir.
Q. What officer are you?
A. I am President.
Q. How long have you been President?
A. Since the corporation's existence.
Q. When was the corporation organized?

Mr. Marcus: May I give you that information?
Mr. Harnach: Let her say, if she knows.
Mrs. Silberman: May, 1933.

Mr. Blabey (cont'g):

Q. You took office in May, 1933?

A. Yes, sir.

Q. Who are the other officers?

A. Well, we have no officers—I am the President and the Treasurer and Benjamin Reiss is the Secretary.

Q. When did Mr. Reiss take office?

A. When the others went out. I think it was in November, 1933..

Q. Were there others connected with the corporation other than Mr. Reiss and yourself?

A. No, nobody else.

Q. What do you mean when you say when the others went out Mr. Reiss took office?

[fol. 48] A. I mean Mollie Smith and Meyer Smith. They were formerly in.

Q. What was the connection of Meyer Smith?

A. He was President at that time—when the corporation was formed.

Q. Do I understand you correctly that he was President at the time the corporation was formed?

A. Yes, sir.

Q. Then, when did you take office?

A. I was at that time an officer also of the corporation.

Q. Were you President?

A. No, I was not. Meyer Smith was President at that time.

Q. What officer was you?

A. I was Secretary and Treasurer.

Q. Now, in May, 1933, when the corporation was organized who were the officers and directors?

A. When it was organized Meyer Smith was President, Bertha Silberman was Secretary and Treasurer.

Q. Bertha Silberman is you?

A. Yes, sir.

Q. And the directors at that time were who?

A. Mollie Smith.

Q. And others?

A. No.

Mr. Marcus: I don't think she understands you. There were three directors at that time.

Mrs. Silberman: I was and Meyer Smith and Mollie Smith were the directors.

[fol. 49] Mr. Blabey (cont'g):

Q. When did you become President?

A. In November, 1933.

Q. At the present time, are there any others connected with the corporation other than you and Mr. Reiss?

A. Abraham I. Jacofs.

Q. What is his official position?

A. He is one of the directors.

Q. Are there any other directors?

A. Well, Bertha Silberman, Benjamin Reiss and Abraham I. Jacofs.

Q. Did you make an application to the Department of Agriculture and Markets for a milk dealer's license for the current license year?

A. Yes.

Q. In the name of the corporation?

A. Mayflower Farms, Inc.

Q. Did you sign the application?

A. Yes.

Q. I show you an application for a milk dealer's license in the name of Mayflower Farms, Inc., signed on the fourth page, "Mayflower Farms, Inc., by Bertha Silberman," and I ask you if that is the application to which you refer, and if that is your signature on the last page?

A. Yes.

(Mr. Marcus examines the application.)

Mr. Blabey: I offer this in evidence, Mr. Director.

Mr. Harnach: It will be received and marked Exhibit No. 2.

[fol. 50] Mr. Blabey (cont'g):

Q. On this application, Mrs. Silberman, Exhibit No. 2 herein, you will note that it says that the directors are as above, and that Mr. Jacofs' name does not appear as one of the directors. Is that correct?

A. Yes. I didn't make this out. It was my accountant who made it out. He made this out and he gave it to me and I signed it. In fact, when he gave it to me I was sick at the time, and I ran down and I had it notarized.

Mr. Marcus: Will the presiding Commissioner please take judicial notice of the fact that under the Corporation

Laws of the State of New York, it is necessary that there be three directors to any particular corporation, and since there is an omission of one name on this particular application blank, it is presumed that there has been an omission made—not willfully done, which omission shall be supplanted by the testimony as given by the applicant.

Mrs. Silberman: That was his fault.

Mr. Blabey: That three directors idea of Mr. Marcus is just the reason why I am leading up to this.

Mrs. Silberman: That was not my fault.

Mr. Harnach: What is the accountant's name?

Mrs. Silberman: Philip Kastenbaum.

Mr. Harnach: His address?

Mrs. Silberman: I don't know.

[fol. 51] Mr. Blabey (cont'g):

Q. On this application the names of Meyer Smith and Mollie Smith do not appear.

A. No.

Q. What was the reason for Meyer Smith and Mollie Smith leaving the corporation as officers and directors?

A. There were differences about money matters and all that and they left.

Q. Was there any other reason?

A. No; it was mainly money matters.

Q. What differences over money matters?

A. They would not put more money into the business to keep it going.

Q. Are they relatives of yours?

A. Of mine?

Q. Yes.

A. Not of mine.

Q. Relatives of Mr. Reiss?

A. No.

Q. Or Mr. Jacof's?

A. No.

Mr. Harnach:

Q. Are they any relatives of Mr. Maxwell Silberman?

Mrs. Silberman: A. Yes. Mr. Smith is a cousin of Mr. Maxwell Silberman.

Q. Is Maxwell Silberman your husband?

A. Yes.

[fol. 52] Mr. Blabey (cont'g):

Q. I notice on the application the date of taking office of yourself and Mr. Reiss is given as "immediately". Will you explain that, please?

A. Immediately. Well, when Mr. Meyer Smith resigned, we took it right over. I took his share of the business right over. Is that what you want to know?

Q. The application is not dated, but it was acknowledged on the 28th day of April apparently, and was received by the Division of Milk Control on the 30th day of April, so that does the word "immediately", in the column given for the date of taking office, refer to those dates?

A. Not the dates. You mean the dates when that was delivered to me. No "immediately" means the day when Meyer Smith resigned and I took his office.

Q. Now, then, other than these people that you have mentioned, is there any one else connected with the corporation in any way?

A. No.

Q. Who has charge of the office?

A. I have charge of the office.

Q. Do you keep the records and books and accounts?

A. I do.

Q. How many routes have you?

A. Just one.

Q. Who handles that?

A. Maxwell Silberman.

Q. What are his duties?

[fol. 53] A. He is the driver and collector.

Q. He collects the bills, does he?

A. Yes.

Q. He delivers the milk to the customers?

A. Yes.

Q. To what class of trade do you deliver milk?

A. Store trade.

Q. All stores?

A. Yes.

Q. And does Maxwell Silberman contact the stores?

A. What does that mean? I didn't get it.

Q. Does Mr. Maxwell Silberman come in contact with the stores and take care of that business?

A. Yes.

Q. Does he solicit accounts—new business?

A. Yes.

Q. Has he been an officer or director of the corporation at any time?

A. No.

Q. Since the organization of the corporation, have you been continuously delivering milk to stores?

A. Yes.

Q. How many store accounts have you?

A. About 50.

Q. I show you a paper dated April 16, 1934, directed to the Division of Milk Control, purporting to be a list of stores to which the Mayflower Farms, Inc., deliver milk. Will you examine that paper and tell me what it is, please? [fol. 54] A. I wrote that.

Q. And what is it?

A. That is a list of the stores to which we deliver milk.

Q. I offer this in evidence.

Mr. Harnach: It will be received and marked Exhibit No. 3.

Mr. Blabey (cont'g):

Q. How many stores are you delivering at the present time?

A. I cannot be exact. About 54 or 53. Don't know exactly. Yesterday we lost one. I cannot be exact.

Q. Approximately?

A. About in the 50's.

Q. From whom do you purchase your milk?

A. From the Supreme Milk & Cream Company.

Q. Where is that located?

A. Perth Amboy, N. J.

Q. Approximately how much milk have you been purchasing daily?

A. It varies according to the weather. Some days 70, 80, 85.

Q. Cases?

A. Cases.

Q. That is what grade?

A. Grade "B".

Q. All Grade "B" milk?

A. Yes.

Q. What price do you pay the Supreme for Grade "B" Milk?

[fol. 55] A. 6⅛ cents.

Q. 6⅛ a quart?

A. Yes. That includes trucking and all.

Q. That milk when you take title to it from the Supreme is already pasteurized, bottled and ready for delivery?

A. Yes.

Q. At what price do you sell the milk to the stores?

A. Just now 9¾ cents.

Q. What price did you formerly receive?

A. 9 cents up to June 11th.

Q. June 11, 1934?

A. Yes.

Q. Do you know whether or not Mayflower Farms, Inc., made application to the former Milk Control Board for a milk dealer's license for the year ending March 31, 1934?

A. Yes.

Q. And at the time the application for license was made do you recall whether or not it was granted by the Milk Control Board?

A. It was not granted.

Q. And do you have a license for the year ending March 31, 1934, issued by the Milk Control Board at any time?

A. I had a license in 1933.

Q. And what license was that?

A. It was issued—do you want the date?

Q. Yes.

A. September 6, 1933.

[fol. 56] Q. Was that a Milk Board license, or a temporary permit?

A. It was a Control Board permit. It was a license. I have the number of the license here—No. 3016.

Q. After the license was issued, were you called before the Milk Control Board for a hearing?

A. Yes.

Q. When was that—do you remember?

A. I don't remember the date.

Q. Do you remember what the result of that hearing was?

A. At that time they said they were going to revoke it.

Q. Do you know whether an order of revocation was ever issued by the Milk Control Board?

A. Yes.

Q. Will you examine that paper, and tell me if that is a copy of the order issued by the Milk Control Board.

(Paper presented to Mrs. Silberman for inspection.)

A. Yes.

Q. You received the original, did you?

A. Yes.

Q. I offer that in evidence.

Mr. Harnach: Any objection, Mr. Marcus?

Mr. Marcus: No.

Mr. Harnach: It will be received and marked Exhibit No. 4.

[fol. 57] Mr. Blabey (cont'g):

Q. After the issuance of this order Mrs. Silberman, which is dated November 22, 1933, was a license ever given to you from the Milk Control Board to act as a milk dealer?

A. No.

Q. That is all.

Mr. Harnach (examines Mrs. Silberman):

Q. Did you continue to purchase and sell milk after you received this official order of revocation?

A. Well, we got a court order, I think it was.

Q. Did you continue?

A. Yes; I continued.

Q. Where is the office and premises of the Mayflower Farms, Inc.?

A. 80 Vernon avenue, Brooklyn, N. Y.

Q. Will you describe, for the record, what is at those premises in the way of property?

A. I had my office there upstairs, and downstairs I have the truck and ice box, the cases, the cans, machine——

Q. A storage?

A. For what?

Q. Where you store cases?

A. Yes—for empty cases and milk cans—just a large loft.

Q. What do you own in the way of delivery equipment?

A. Delivery—well, I own a truck.

Q. Is that truck stored on the premises at No. 80 Vernon avenue, Brooklyn, when not in use?

[fol. 58] A. Yes.

Q. When the corporation was first formed in May, 1933, how many stockholders did you have?

A. Stockholders—two.

Q. Who were they?

A. Meyer Smith and Bertha Silberman.

Q. How much money was invested in the corporation at that time?

A. We didn't put all the money into it right away. We put in some of it, and as we went on we put more into it.

Q. How much did you start with?

A. I think it was about $2,500. I don't remember the exact amount.

Q. About $2,500?

A. I mean about that much.

Q. About how much did Mr. Meyer Smith put in?

A. He put in half of that. Whatever we put in, he put in half.

Q. In what did you invest this money?

A. In bottles, cases, fixing up the place, fixing the office up, buying the truck, stationery, building the ice box.

Q. Did you have any customers at the time you started business?

A. I had promises that they were going to take milk from us when I started. Since I got started they took it.

Q. How did you get these promises?

A. Old friends of ours, old customers that we had for years back.

[fol. 59] Q. Did you get these promises by going around and soliciting trade after you decided to go into the milk business?

A. Well, when they heard that we were going in—those that heard that we were going in said that we could have their business as soon as we got started.

Q. Had you been engaged in the milk business as a dealer at any time before May, 1933?

A. I was not in the milk business, but Mr. Maxwell Silberman was born and brought up in the milk business all his life.

Q. Was it Mr. Maxwell Silberman's money which was invested in this, or your own?

A. Mine.

Q. Aside from you and Mr. Reiss, the third director is Mr. Abraham I. Jacofs. In what way is he related to you?

A. He is my brother.

Q. Would you mind stating for the record the members of Mr. Maxwell Silberman's family, beginning with his mother?

Mr. Marcus: Objection, on the ground that this question, if the Commissioner please, is entirely irrelevant and immaterial in this matter. We are here for the purpose of the Mayflower Farms, Inc.

Mr. Harnach: I understand. What good does it do you to object to a question that I ask?

Mr. Marcus: I do not see what the relationship of some outside persons has to do with this business.

[fol. 60] Mr. Harnach: I overrule your objection and give you an exception.

Q. What is his mother's name?

Mrs. Silberman: A. Annie Silberman.

Mr. Harnach (cont'g):

Q. Is his father dead?

A. Yes.

Q. How many children did Annie Silberman have?

A. She had seven.

Q. Will you name them?

A. Maxwell Silberman, Irving Silberman, Ben Silberman, a daughter, too, Rose Silberman, Sam Silberman, Kenneth Silberman and Jerome Silberman.

Q. How many are living—are they all living?

A. Yes.

Q. Is Mrs. Annie Silberman engaged in business as a milk dealer?

A. Of the Mayflower Farms?

Q. Is she engaged in the business of a milk dealer?

A. Of the Camron Farms.

Q. How do you spell it?

A. Camron.

Q. Is that a corporation?

A. I guess so.

Q. Are any of the others of Mr. Maxwell Silberman's brothers or sisters engaged in the milk business——

[fol. 61] A. Mr. Benjamin Silberman, of Shirben Farms.

Q. Is that a corporation?

A. Yes.

Q. Are any of the others?

A. No.

Q. Did Mr. Irving Silberman engage in any milk business at any time?

A. He was.

Q. What does he do now?

A. I don't know. He is in the Camron—manager or something. I have no interest in Camron Farms at all.

Q. Do you come in contact with Mrs. Annie Silberman frequently?

A. Yes.

Q. Do you know the officers of the Camron Farms?

A. No, I don't.

Q. Who did you say was manager of the Camron Farm's business?

A. I think so—I am not sure.

Q. Who is?

A. I think Irving Silberman—I don't know—I really don't know.

Mr. Harnach: That is all.

Mr. Marcus: I move at this time, Mr. Commissioner, to strike out all of the evidence given as of no material effect in the application for the year 1934. In conformity with the new Milk Control Law, which is now in effect, no evidence [fol. 62] has as yet been shown where the Mayflower has forfeited its right for a permit.

Mr. Blabey: I ask the director to reserve any decision as to whether or not any rights have been forfeited. It is my contention and allegation naturally that I have made out a case, and I think it has been shown that the applicant operated without a license during the past year, and that in itself is sufficient to deny the application for a license. I do not think, in the case I have made up to this point, it should be dismissed.

Mr. Harnach: The motion to dismiss is denied.

Mr. Marcus: Exception.

Mr. Blabey: As to the evidence, may I say that these family connections may be very material on an application of this kind, particularly in view of the fact—if it can be shown that some of these other corporations made applica-

tion for a license—before the Milk Control Board on hearings.

Mr. Marcus: At this time I move to strike out the testimony or comment made by counsel for the Milk Control Division, due to the fact that his statement is a conclusion, and there are no facts or evidence bearing out that which he says about the family affairs of the business. There is nothing in the evidence to show that and such statement would only tend to mislead the Director.

[fol. 63] Mr. Blabey: I can introduce in evidence the folder of the Camron Farms, and I suppose I can ask witness to identify those individuals.

Mr. Harnach: I will dismiss the motion and give you an exception.

Mr. Blabey: I will introduce at this time a copy of the order of the Appellate Division dismissing a certiorari order in the matter of the application of the Mayflower Farms, Inc.

Mr. Harnach: Any objection, Mr. Marcus?

Mr. Marcus: I might add that that particular dismissal, due to the fact that the case has been dismissed, was due to the procedure on the part of the attorney who represented the company at that particular time.

Mr. Blabey: I think the order will speak for itself.

Mr. Harnach: It will be received and marked Exhibit No. 5.

Mr. Blabey: I might say that this mention of the family connections by me was in reference to sub-division j of section 258-c of the law.

Mr. Harnach (examines Mrs. Silberman):

Q. Who is Jerry Silberman?

Mrs. Silberman: A. A brother-in-law.

[fol. 64] Q. A brother of Maxwell Silberman?

A. Yes.

Q. Who is Helen Silberman?

A. She is the wife of Irving Silberman.

Q. Is there any Isadore Silberman ?

A. That is his name—it is either Irving or Isadore.

Q. Which is the correct name?

A. I don't know.

Q. Who is Rae Price?

A. I don't know.
Q. Do you know Ruth Rosenthal?
A. No.
Q. Or Beatrice Wishnew?
A. No, I don't know her.

Mr. Marcus: Again I make the motion that all of this questioning is out of place as incompetent, irrelevant and immaterial and has no bearing on this particular notice of hearing to the Mayflower Farms, Inc., insofar as the business operations of the applicant and the sale of milk to stores as specified in the formal notice of this hearing, served upon the applicant, the Mayflower Farms, Inc. All other matters than those specified in the notice of hearing are incompetent, irrelevant and immaterial, and has nothing to do with this particular case.
Mr. Harnach: Objection overruled.
Mr. Marcus: Exception.

[fol. 65] Mr. Marcus (examination of Mrs. Silberman):

Q. Mrs. Silberman, let us go back to the time when this corporation was formed, to clear up just how the formation came about, and what occurred between members of the corporation. When this corporation was formed, who were the persons who were officers and directors and investors of money in this corporation?
A. Meyer Smith, President. I was the Secretary and Treasurer at that time.
Q. What was Mollie Smith?
A. She was one of the directors.
Q. Is she related to Meyer Smith?
A. She is his wife.
Q. At that time, did you put any money in this business?
A. Yes.
Q. Did you put in an amount equal to Meyer Smith?
A. Yes.
Q. At a later date, was some one's share bought out?
A. Meyer Smith's share was bought out. I bought Meyer Smith's share.
Q. Did you pay him in cash or in notes?
A. All cash.
Q. You became the sole stockholder of this corporation?
A. Yes.

Q. Were you the only one with money in this corporation?

A. Yes.

[fol. 66] Q. And the reason that he got out—what was the reason he wanted to get out of the business?

A. We needed more money to invest and pay for different things. He didn't want to invest any more money and he withdrew and I took it over.

Q. When you say "we", who do you mean?

A. Mayflower Farms, [illegible].

Q. Did you pay him from Mayflower Farms, Inc.?

A. I did.

Q. You said that you were purchasing milk from the Supreme Milk & Cream Company—is that so?

A. Yes.

Q. Do you know whether the Supreme Milk Company sell an advertised or unadvertised brand of milk?

A. Unadvertised.

Q. It is labeled——

A. Yes.

Q. I show you this cap, which reads "Puritan Dairy, Grade B Milk, Pasteurized at Perth Amboy, N. J. Not to be sold after 12 midnight, Monday, Perth Amboy, N. J." I show you this cap and ask you whether it is a sample cap of caps on milk sold by you to your customers?

A. Yes.

Q. I wish to offer this in evidence.

Mr. Harnach: It will be received and marked Exhibit No. 6.

[fol. 67] Mr. Marcus (continues examination):

Q. Do you know other people who are buying milk from the Supreme Milk Company?

A. Bellach Farms, Shirben Farms, Lima Dairy.

Q. Do you know any others?

A. Camron Farms, Glen Dale Dairy.

Q. Do you know whether all of these people that you have mentioned are selling the milk as an advertised or unadvertised brand of milk?

A. Unadvertised brand of milk.

Mr. Marcus: I wish the Commissioner would take judicial notice of the fact that the Division of Milk Control has

records which will show that these concerns enumerated, and all the other concerns which are purchasing milk from the Supreme Milk Company are all purchasing that milk from an unadvertised brand of dealer, and are selling it as an unadvertised brand.

Mr. Harnach: We would like to have you bring out the point at which this milk becomes the property of the Mayflower Farms, Inc. Where does title pass?

Mr. Marcus: What significance could that be?

Mr. Harnach: I want to know——

Mr. Marcus: You want to know if f. o. b. Perth Amboy, N. J., etc. She says that she pays 6⅛ cents, which includes transportation to her door.

Mr. Harnach: In other words, it is not her milk until it is delivered to her.

[fol. 68] Mrs. Silberman: This price just quoted—6⅛ cents—that was prior to June 11th. I have no price after that yet.

Mr. Marcus (cont'g):

Q. Now, Mrs. Silberman, did you have a permit for the year 1933 from the New York City Health Department?

A. Yes.

Q. Have you a permit for 1934 from the New York City Health Department?

A. I have.

Q. You have a New York City Health Department — for the year 1934. What is the number of that permit, and when was it issued?

A. March 13, 1934, for six months, and the license number is 387080.

Q. In the year 1933, which was last year, you made application and applied for a license from the New York State Milk Control Board. At that time, did you send them a check as a fee for the license?

A. Yes.

Q. Did they receive that check?

A. Yes.

Q. They accepted your money?

A. They accepted.

Q. Now, you say you received their license in the year 1933?

A. Yes.

Q. Can you tell me when you actually received that license, regardless of the date on the license? When did you actually receive it?

[fol. 69] A. From the Control Board?

Q. Yes.

A. For 1933, do you mean?

Q. Let me put the question another way.

A. I received it before we had our truck rolling, is that what you mean?

Q. Let me ask you another question? Did you receive this license before you received a notice of a hearing to revoke your license last year, or after you received the notice.

A. I got the permit before.

Q. Now, coming to your family affairs. Are you on speaking terms with Annie Silberman, your mother-in-law?

A. No.

Q. Do you ever go to the Camron Dairy's business to visit her there?

A. No.

Q. Were you ever there?

A. I was there about four or five years ago.

Q. Were you there in the last year?

A. Not for about four years now.

Q. When you say they owe you——

A. They owed me at that time.

Q. There was a controversy about that?

A. Yes.

Q. There was a strained relationship?

A. Yes.

Q. Have you a strained relationship with Irving Silberman?

A. Yes.

Q. With his wife?

[fol. 70] A. Yes.

Q. How about the remainder of the members of the family such as you have mentioned?

A. My brother-in-laws?

Q. Do you see them very often?

A. Just when they pass my place; they come in to see me.

Q. Have you any money in the Camron business?

A. No.

Q. Have you any money invested in any business—milk business, other than the Mayflower Farms, Inc.?

A. No.

Q. Has any other person, besides you, invested any monies at the present time? That is, any investment up to the present time in the Mayflower Farms?

A. Right now, I have all the investment in the Mayflower Farms, Inc.

Q. About how much money?

A. Between $4,500 and $5,000—maybe a little more. Over $5,000.

Q. In the districts where you sell your milk, that is, the Mayflower Farms sells its milk, on those particular streets, or in the same stores, are there other dealers that also serve milk from Perth Amboy?

A. Yes.

Q. Do you mean on the same street or identical stores?

A. Not in the same stores, but on the same street.

[fol. 71] Q. The same kind of bottle?

A. We have our own bottles.

Q. The labelling of the milk?

A. Yes.

Q. The same identical label?

A. Yes.

Mr. Harnach:

Q. Is there any name on the bottle?

A. Mayflower Farms.

Mr. Marcus (cont'g):

Q. In other words, the milk is produced and pasteurized by the Puritan Milk Company, Perth Amboy, N. J.

A. Yes.

Q. And all you supply is the empty bottle?

A. Yes.

Q. Do they label the milk and ice it and deliver it to you, and you just distribute it?

A. That is all.

Q. Do you know whether any milk is being sold in the City of New York today to any city institutions for 8 cents?

A. Yes.

Q. Who is selling it?

A. Those milk stations.

Q. You refer to New York City stations?

A. Yes.

Q. Are they competing with you?

A. They certainly are.

Q. Do any of your customers buy milk from these stations?

[fol. 72] A. I don't know whether they buy directly, but they don't take as many cases from us as they did before.

Mr. Blabey: I am not sure that it is relative, at the same time I have no objection as to its going in. I am not convinced as to the relevancy of the testimony.

Mr. Marcus: I wish to show that the New York State Milk Control Board cannot properly enforce its laws, insofar as the price situation in New York City is concerned, if any governmental agency of the City of New York is going to violate the orders of the New York State Milk Control Board. I know, of my own knowledge, that numerous complaints have been made by various dealers that this situation has made it a hazard, and that the price structure promulgated by the Board is seriously handicapped and perhaps in grave jeopardy.

Mr. Harnach: Is the quantity of milk being sold by the City of New York increasing daily?

Mr. Blabey: It can have no particular relevancy at this time on this hearing—as regards this applicant, as all sales brought out on direct examination have taken place before the City of New York began to sell this milk. In any event, so many factors have come into play at this time, I don't see how it is proper before a hearing held on the applica-
[fol. 73] tion of the Mayflower Farms, Inc.

Mr. Harnach: I am disposed to accept some information.

Mr. Blabey: I have to object on that.

Mr. Marcus (cont'g):

Q. Let me go back to something said earlier in the hearing. You said you paid 6⅛ cents for milk. Was that prior or after the last order went into effect with the price increase of one cent a quart, which one cent was divided one-half to the farmer, one-quarter to the dealer, and one-quarter to the grocer?

A. That was before.

Q. In other words, since the last order, you don't know what the price will be that will be charged to you by the Perth Amboy Company?

A. I will know tomorrow.

Q. What price do you get for your milk when you sell it to the stores?

A. 9¾ cents.

Q. What did you get before this order went into effect?

A. 9 cents.

Q. Has the Milk Control Board ever sent anybody to check your records to see if that was so?

. About two weeks ago—they looked over all of my books.

Q. You find it easy to get customers at that price?

A. No, I don't.

[fol. 74] Q. Why cannot you get customers at that price?

A. Because some of the others are getting it for 8 and 7¾ cents right now. I won't mention any names.

Mr. Harnach:

Q. Are you losing any customers as the result?

A. Yes. We lost a customer yesterday.

Q. Have you gained any customers?

A. No; we are losing.

Mr. Marcus (cont'g):

Q. How much milk do you sell a day?

A. It varies—about 75, 80 or 85 cases.

Q. How many drivers have you?

A. Mr. Maxwell Silberman and some one to help him.

Q. Your husband?

A. Yes.

Q. You have one route?

A. Yes.

Q. Did you file an application for the year 1934?

A. Yes; I did.

Q. Did you send your check with it?

A. I did.

Q. The check was accepted?

A. It was accepted.

Q. The application—you don't know about that?

A. My check came back.

Q. Was your application accepted? Were you informed [fol. 75] that a license would be issued at any time?

A. No.

Q. Is there anything else that you wish to add to the questions that I have put before you?

A. I just want to tell the Commissioner that we are having a hard time to keep in business. It seems as if the big fellows are trying to put us out. Certain stops where we were selling six cases a day they cut us down—just for friendship's sake they still hold on to one case. It seems as if the big fellows can do the dirty work and get away with it, and the little fellow just has to get out of it. In fact, I was talking to the Milk Board Inspectors and they told me that they know as a fact that they are all chiseling and that they are all cutting the price and are trying to shove the Mayflower out and all the little dealers, and they have their association and are working against those that are not in it.

Mr. Marcus (cont'g):

Q. Did any one ever ask you to join an association and say "if you pay us you will not be molested"?

A. Yes, but I don't want to mention any names. Certain milk dealers did it. At the head of the association are like Louis Gimbel. Some one called me up—and told me they would push me out of business, and some one that is taking care of the milk dealers' association, Mr. Neidner—he said the milkmen have it in for me, and they are trying to get us out. They are putting in all the complaints they get.

[fol. 76] Mr. Blabey:

Q. When did you start buying milk from the Supreme, Mrs. Silberman?

A. I don't know the exact date, but we were dealing with Honeybrook Farms, and when they went out of business—a few days before—we were told they were going out of business—we started with Supreme.

Q. Can you remember the approximate time that that was?

A. How long ago?

Q. Yes.

A. I don't know the exact date. It should be about five months ago, or so.

Q. When the corporation was first organized in May, 1933, from whom did you buy milk then?

A. Honeybrook Farms.

Q. From May, 1933, to the time that Honeybrook went out of business, you purchased from Honeybrook?

A. Yes.

Q. Since that time you have been purchasing exclusively from Supreme?

A. Yes.

Q. When did you sell the first quart of milk, do you recall, under the name of the "Mayflower Farms"?

A. Since I got my license. I think the beginning of September. We were waiting for the license.

Q. Had you sold any milk in the name of "Mayflower Farms, Inc." before September, 1933?

[fol. 77] A. No. We did not sell any until we got the license.

Q. That license is a Health License or Milk Board License?

A. Milk Board license. The health license we got before.

Q. Have you a health permit at the present time from New York City?

A. Yes. I gave you the number of it.

Mr. Harnach:

Q. Was the application for license which you submitted for Mayflower Farms made out by the same person who made out the application for the Camron Farms?

Mrs. Silberman: A. I don't know.

Mr. Marcus: You can answer that question.

A. The same person—you mean, who signed it?

Mr. Harnach:

Q. Yes.

A. I think the accountant is the same fellow. He is for Shirben, also.

COLLOQUY

Mr. Marcus: I might say at this time that Mr. Manley, who is attorney for the Milk Control Board on two previous occasions has himself stated that Section 258, or last year it was called in the old law, Section 317, subdivision "c," and he has said on two occasions, records of which are now [fol. 78] in the courts of this state, that he thought that this particular section was unconstitutional, and I am inclined to agree with him, for this reason. I don't think it

was the intention of our Legislature to prevent any person from conducting a legitimate business, and it certainly would be a flagrant violation and restraint of trade were any law to be interpreted in such fashion as to prevent anybody from starting in business, and it certainly would be a grave discrimination if we were to penalize such person because he starts in business. It says you must sell a product which is not an advertised brand of milk for a cent more than your competitor who is handling the same brand of milk, and that the grocery, where the milk is delivered by a dealer who is a little later in the business, and the consumer will be penalized to pay one cent more for the same identical milk. That is my opinion, and I might say that it is in line with what Mr. Manley has said. That particular section, I think, is unconstitutional. I don't think it is right. I think it is discriminating and tends to form a monopoly for those select few who might have been in business prior to a certain date. If they handle an advertised brand, they should sell at the advertised brand price, but in view of the fact that there are competitors in the same [fol. 79] vicinity as stores sold by this witness, I don't see why she should be penalized to sell milk for one cent more than somebody else.

Mr. Blabey: If the section is unconstitutional, as you allege, your client is not penalized, is she, for the reason that she would be compelled in any event to charge a cent more.

Mr. Harnach: The point which Mr. Blabey makes, if the section is unconstitutional, there is no privilege—therefore, your client and others are selling under prescribed prices.

Mr. Marcus: I cannot say otherwise unless I say a falsehood. I say we are selling milk at the same price as any other dealer in the City of New York should be selling if he were selling at unadvertised brand prices. There is an order in existence by this Board, which says that only a select few of the dealers are classed as having advertised brands of milk—Borden, Sheffield, Dairymen's League, Renken. Never has there been an order issued making any other brand of milk an advertised brand of milk.

Mr. Blabey: Do you claim that the United States District Court in the case of Borden's Farm Products against the Commissioner of Agriculture and Markets upheld the unconstitutionality of this case?

[fol. 80] Mr. Marcus: There the Court held that it was not discriminatory against the company which was selling an actual advertised brand of milk, but here you are trying to penalize a person who is selling an unadvertised brand of milk to sell for the advertised brand price.

Mr. Blabey: If the section should be declared unconstitutional, as you allege it is, your client is not penalized because in that event she will charge a cent more.

Mr. Marcus: Let me say this: You might say to me, my client is getting a cent more. You, with your experience sitting here at these hearings, know how difficult it is to get that minimum price, not saying anything about getting more than the minimum price. That is what you people want them to do. They complain that they cannot get the minimum. Therefore, their minimum price is really the maximum price. I think there is a case—the Hegeman case—that particular matter is now pending in the United States Supreme Court. There is also another case I would like to call to your attention, but I cannot put my finger on it.

Mr. Harnach: The hearing is adjourned and the decision is reserved.

[fol. 81] MEMORANDUM—ANNEXED TO RETURN

Department of Agriculture and Markets

Albany Office

From: J. W. Harnach.
To: Mr. Robert G. Blabey, Assistant Counsel.
Date: July 3, 1934.
Subject: Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, N. Y.

Pursuant to your verbal request therefor, I submit recommendation based upon hearing held June 20, 1934 (not June 18, 1934, as shown on transcript), on above corporation's application for milk dealer's license.

Applicant was incorporated on May 27, 1933, and on April 10, 1933, was not engaged in the business of purchasing and handling milk not having a well-advertised trade name in the City of New York; nor is it shown to be a successor to any person possessed of the privilege provided by Section 317 (c), Chapter 158, Laws of 1933, and Section 258-q, Chapter 126, Laws of 1934.

It appears that the applicant has at all times sold an unadvertised brand as though entitled to the aforesaid privilege. The Milk Control Board rules that it was not entitled thereto, and on November 22, 1933, revoked license No. 3016, issued September 6, 1933, revocation to become effective December 1, 1933.

[fol. 82] Applicant has continued to sell an unadvertised brand under the prescribed minimum price, which seems to provide cause for refusal to grant a license under subdivision (k), Section 258-c, Chapter 126, Laws of 1934.

J. W. Harnach.

JWH:MC.

MEMORANDUM—ANNEXED TO RETURN

Department of Agriculture and Markets

Albany Office

From: Robert G. Blabey, Assistant Counsel.
To: Kenneth F. Bee, Director.
Date: July 3, 1934.
Subject: Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, N. Y.

I am attaching hereto recommendation of Director Harnach in the Matter of Application of Mayflower Farms, Inc., 80 Vernon Avenue, Brooklyn, N. Y., for a Milk Dealer's License pursuant to the provisions of Article 21 of the Agriculture and Markets Law.

Robert G. Blabey.

RGB/MEW.

[fol. 83] MEMORANDUM—ANNEXED TO RETURN

Department of Agriculture and Markets

Albany Office

From: Mr. Fee.
To: Mr. Blabey.
Date: July 7, 1934.
Subject: Mayflower Farms, Inc., 80 Vernon Ave., Brooklyn, N. Y.

After reviewing Mr. Harnach's memorandum of July 3, in re the above matter, to which you also refer in your

memorandum of the same date, and after having discussed the matter with Mr. Manley, I am of the opinion that the application of Mayflower Farms, Inc., should be denied.

Will you please prepare an order denying such application.

Kenneth F. Fee, Director.

KFF:WG.

Order prepared and sent Registered Mail—7/9/34.

R. G. B.

[fol. 84] OFFICIAL ORDER DENYING PETITIONER'S APPLICATION FOR LICENSE, DATED JULY 9, 1934—ANNEXED TO RETURN

State of New York

Department of Agriculture and Markets

Division of Milk Control

In the Matter of the Application of MAYFLOWER FARMS, INC., 80 Vernon Avenue, Brooklyn, N. Y., for a Milk Dealer's License Pursuant to the Provisions of Article 21 of the Agriculture and Markets Law.

An application for a Milk Dealer's License pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934), having been made to the Commissioner of Agriculture and Markets by Mayflower Farms, Inc., of No. 80 Vernon Avenue, Brooklyn, N. Y., and due and proper notice of hearing on said application having been given, and said Mayflower Farms, Inc., having appeared before the said Commissioner on the 18th day of June, 1934, by Harry L. Marcus, Esq., its counsel, and Mrs. Bertha Silberman, its president, and said hearing having been duly held and due deliberation having been had and just and sufficient cause having been found; [fols. 85-87] It is hereby ordered that the said application of Mayflower Farms, Inc., for a Milk Dealer's License as aforesaid be and the same hereby is denied.

Dated at Albany, New York, this ninth day of July, 1934.

Charles H. Baldwin, Commissioner of Agriculture and Markets of the State of New York. Kenneth F. Fee, Director, Division of Milk Control. (Seal.)

[fol. 88] IN SUPREME COURT OF NEW YORK, COUNTY OF ALBANY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please take notice that the above named petitioner-appellant, Mayflower Farms, Inc., hereby appeals to the Court of Appeals of the State of New York from the order of confirmation of the Appellate Division of the Supreme Court, Third Department, dated November 2, 1934, and entered in the office of the Clerk of the County of Albany on November 3rd, 1934, which order confirms the determination of the respondents and their order dated July 9, 1934, which denies the petitioner-appellant's application for a license as a wholesale milk dealer for the license year ending March 31, 1935, pursuant to the provisions of Article 21 of the Agriculture and Markets Law, and from each and every part of said order of confirmation and said determi-
[fol. 89] nation and from the whole thereof.

Dated, Albany, N. Y., December 8th, 1934.

Yours, etc., Seymour Ellenbogen, Attorney for Petitioner-Appellant, Office and Post Office Address, 75 State St., Albany, N. Y.

To Henry S. Manley, Esq., Attorney for Defendants-Respondents, State Office Bldg., Albany, N. Y., and —— ——, Clerk of the County of Albany.

[fol. 90] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

In the Matter of the Application of MAYFLOWER FARMS, INC., Petitioner,

for a Certiorari Order against

CHARLES H. BALDWIN, Commissioner of Agriculture and Markets of the State of New York, and another, Respondent

ORDER OF CONFIRMATION

The above entitled certiorari proceeding having duly come on for argument, and the Court having heard argu-

ment on behalf of Seymour Ellenbogen, Esq. (Bernard Ellenbogen, Esq. of counsel) for the petitioner, and having heard Henry S. Manley, Esq., for the respondent, and due deliberation having been had, it is hereby

[fol. 91] Ordered that the determination be confirmed with ($50.00) dollars costs and disbursements.

Rhodes, Crapser and Heffernan concur.

Hill, P. J., and Bliss, J., dissent.

John S. Herrick, Clerk. (Seal.)

A true copy.

John S. Herrick, Clerk.

Entered November 3, 1934.

IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION EXCEPT DISSENTING MEMORANDUM BY HILL, P. J.

STATE OF NEW YORK,
City and County of Albany, ss:

Seymour Ellenbogen, being duly sworn, says:

I am the attorney for the petitioner-appellant named in this certiorari proceeding and am familiar with all the proceedings herein.

No opinion was delivered by the Appellate Division, Third Department, on confirming the determination of the respondents herein, except the following decision and dissenting memorandum by Mr. Presiding Justice James P. Hill:

[fol. 92] Determination confirmed, with fifty dollars costs and disbursements.

Rhodes, Crapser and Heffernan, JJ., concur.

Bliss, J., dissents.

Hill, P. J., dissents, with a memorandum:

HILL, P. J.:

I dissent. This petitioner began business as a milk dealer in the City of New York on May 27, 1933. The statute in effect requires that a dealer beginning business after April

10, 1933, shall sell its milk for one cent a quart more than a dealer who was in business before April 10, 1933, received for the same grade of milk. This as effectively prevents a person from beginning business as though the statute in terms contained a direct prohibition. The reasonableness of the regulations prescribed by the Legislature in the milk emergency is subject to court review. A court may consider "the legitimacy of the conclusions drawn from the facts found". (People v. Nebbia, 262 N. Y. 259, 268.) The facts before the Legislature did not justify giving a monopoly to dealers in business on April 10, 1933. Petitioner's constitutional right to engage in a lawful business has been abridged.

Seymour Ellenbogen.

Sworn to before me, this 26th day of December, 1934. Lillian D. Campagna, Com'r of Deeds, Albany, N. Y.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 94] IN COURT OF APPEALS OF NEW YORK

In the Matter of MAYFLOWER FARMS, INC., Appellant,

against

CHARLES H. BALDWIN, as Commissioner of Agriculture and Markets of the State of New York, et al., Respondents

Constiutional Law—Police Power—Milk Control—Statute Permitting Class of Milk Dealers, Engaged in Business at Specified Date, to Sell Milk at a Price Lower Than Dealers of Same Class Who Entered Business Thereafter are required to Charge, Valid

The provision of section 258-q of the Agriculture and Markets Law (Cons. Laws, ch. 69) which permits a class of milk dealers who were engaged in that business at a speci-

fied date to sell milk at a price lower than dealers of the same class who entered the business thereafter are required to charge is valid and not violative of section 1 of the Fourteenth Amendment of the Federal Constitution. The Legislature had power to correct a demoralized condition in the milk business by the establishment of a uniform fair price at which milk could be sold and it may reasonably have determined from the facts before it that new competition in the class referred to, during the emergency period, would have an injurious effect upon the result which it was attempting to accomplish. If the Legislature believed the limitation had a reasonable relation to its desired purpose and the facts reasonably justified that belief, it acted within its jurisdiction.

Matter of Mayflower Farms, Inc., v. Baldwin, 242 App. Div. 881, affirmed.

(Argued February 25, 1935. Decided April 16, 1935)

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered November 3, 1934, which confirmed, on certiorari, a determination of Charles H. Baldwin, as Commissioner of Agriculture and Markets of the State of New York, and Kenneth F. Fee, as Director of the Division of Milk Control, [fol. 95] denying an application by petitioner for a milk dealer's license.

Seymour Ellenbogen and Bernard Ellenbogen for appellant: The time limitation created by the words "since April tenth, nineteen hundred thirty-three," in the unadvertised differential provision, which prevents the appellant from enjoying and exercising the privilege thereby conferred, is upon its face arbitrary, discriminatory, unjust, irrational, prejudicial, unreasonable, confiscatory, invalid and unconstitutional and denies to the appellant the equal protection of the laws. (Borden's Farm Products Co. v. Baldwin, 293 U. S. 194; Smith v. Cahoon, 283 U. S. 553; Hegeman Farms Corp. v. Baldwin, 293 U. S. 163; Nebbia v. New York, 291 U. S. 502; Lawton v. Steele, 152 U. S. 133; Colon v. Lisk, 153 N. Y. 188; Wright v. Hart, 182 N. Y. 330; Lochner v. New York, 198 U. S. 45; People v. Gilbert, 68 Misc. Rep. 48; Matter of Berger v. Quinn, 149 Misc. Rep. 545; People v. Marx, 99 N. Y. 377; People ex rel. Farrington v. Mensching, 187 N. Y. 8; People v. Beakes Dairy Co.,

222 N. Y. 416; People ex rel. Tyroler v. Warden, 157 N. Y. 116; Fisher Co. v. Woods, 187 N. Y. 90; Adams v. Tanner, 244 U. S. 590; Pabst Corp. v. Milwaukee, 190 Wis. 349; Matter of Pell, 171 N. Y. 48.) The time limitation may be excised from the unadvertised differential privision without doing violence to the intention of the Legislature and without hampering or impairing the effectiveness of the provision or of the Milk Control Law. (Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 270.)

Henry S. Manley for respondents: There was good reason for limiting the privilege of selling at the unadvertised price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. That classification is not unconstitutional. (Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502; Buck v. Bell, 274 U. S. 200; Watson v. Maryland, 218 U. S. 173; People v. Griswold, 213 N. Y. 92; Cooper v. Rollins, 152 Ga. 588; People [fol. 96] v Logan, 284 Ill. 83; Criswell v. State, 126 Md. 103; Commonwealth v. Ward, 136 Ky. 146; State v. Creditor, 44 Kan. 565; Matter of Whitley, 144 Cal. 167; Bowen v. Schenectady, 136 Misc. Rep. 307; 231 App. Div. 779; Sammarco v. Boysa, 193 Wis. 642; Manheim v. Harrison, 64 La. 564; Aurora v. 1Burns, 319 Ill. 84; Spector v. Building Inspector, 250 Mass. 63; City of New York v. Kelsey, 158 App. Div. 183; 213 N. Y. 638; Baylis v. Van Nostrand, 176 App. Div. 396; Commonwealth v. Charity Hospital, 198 Penn. St. 270; Commonwealth ex rel. Elkin v. Charity Hospital, 199 Penn. St. 119.)

OPINION

HUBBS, J.:

Appellant is a domestic corporation engaged in the sale of milk at wholesale to stores in New York City. It was organized in May, 1933. In April, 1934, it made application for a milk dealer's license. A hearing was held upon the application and it was found that appellant was engaged in selling an unadvertised brand of milk, that is, milk not having a well-advertised trade name. The application was denied for the reason that appellant had violated a price-fixing order by selling milk at the unadvertised price which was one cent per quart below the price fixed by respondent for the sale of milk having a well-advertised trade name. It was decided that as appellant was not engaged in

the milk business on April 10, 1933, it was not entitled to avail itself of the one cent unadvertised price differential provided for in section 258-q of the Agriculture and Markets Law (Cons. Laws, ch. 69) which became effective April 1, 1934.

Chapter 158, section 317, subdivision c. of the Laws of 1933, was substantially the same as chapter 126, section 2 (258-q), of the Laws of 1934, which reads as follows:

"It shall not be unlawful for any milk dealer who [at the time this act shall take effect is] *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores [fol. 97] in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name be more than one cent per quart below the minimum price fixed [by the board] for such sales to stores in such a city."

The words in brackets were eliminated in the revision of the law in 1934 and the words in italics were added. The effect is to leave the date April 10th, 1933, the same in both enactments.

The sole constitutional question urged is that the provision of section 258-q allowing unadvertised dealers to sell milk at a lower price than advertised dealers, provided they were engaged in the business on April 10th, 1933, and preventing unadvertised dealers who became such subsequent to that date from selling at a lower price, is unconstitutional and void in that it violates section 1 of the 14th Amendment of the United States Constitution.

The constitutionality of the emergency legislation embodied in the milk regulation law, chapter 158 of the Laws of 1933, in various phases has been passed upon by the courts. People v. Nebbia (262 N. Y. 259; affd., 291 U. S. 502) passed upon the price fixing provision and held it to be constitutional. In Matter of Eisenberg Farms, Inc., v. Baldwin (265 N. Y. 662) this court decided that the differential clause in favor of co-operative associations which

permitted them to pay to producers less than the price fixed by the Commission for milk was constitutional. The case of Borden's Farm Products Co. v. Baldwin (7 Fed. Supp. 352; reversed and remanded to the court to make findings of fact in 293 U. S. 194, without passing upon the constitutional question) involved the question of the constitutionality of the unadvertised differential provision in its entirety. The statutory court provided for by section 266 of the Judi- [fol. 98] cial Code (28 U. S. C. A., § 380) held it to be constitutional in an opinion by Judge Learned Hand.

The opinions in those cases have stated in great detail the conditions in the milk producing and marketing business in the State at and prior to the date of the enactment in question. They call attention to the fact that the statute was enacted after careful and extended investigations by committees of the Legislature into the milk business as a whole. They point out the chaotic condition existing in the business and the injurious effect produced thereby upon the farmers of the State engaged in milk production, upon the public health and general welfare.

We do not feel called upon to restate the conditions so fully stated in those opinions. We confine our discussion to the single question of whether the Legislature exceeded its power in fixing a specific date, the date when the original statute became effective, April 10, 1933, as the date after which unadvertised dealers not in business at that time were prohibited by the effect of the act from selling milk at a price less than that at which advertised dealers were required to sell.

In New York City there are four large corporations engaged in the milk business. Their brands of milk are highly advertised and well known to all retail dealers and purchasers of milk. The have come to be known as the advertised companies. There were hundreds of small dealers who sold unadvertised brands and they are known as the unadvertised dealers. They purchase their milk from about 50,000 independent farmers. When the Legislature determined upon the policy of regulating and fixing the price at which milk could be sold it was confronted by the fact that the unadvertised dealers could not successfully compete with the advertised dealers, if required to sell their unadvertised milk at the same price at which the advertised dealers sold. Prior to that time the unadvertised

dealers had sold milk about one cent per quart less than [fol. 99] the price charged by advertised dealers. The market was familiar with that condition and, as a result, farmers selling milk to the dealers had become divided into two classes, one selling to the advertised dealers which owned and operated large and extensive plants in favorable localities for collecting and shipping milk, and the other, known as independent farmers, selling to the unadvertised dealers, less favorably equipped, but still, on the whole, having large sums invested in their business. It was believed that the effect of establishing a uniform price at which milk should be sold by all dealers would be to drive the unadvertised dealers out of business and work a practical confiscation of their property. That would also deprive about 50,000 farmers of a market for their milk and leave them unprotected. At the same time it would consolidate the entire milk business of New York city in the four large advertised companies.

To meet the situation, the Legislature enacted the provision allowing a differential price in favor of the unadvertised dealers and that provision has thus far been held to be constitutional. (Borden's Farm Products Co. v. Baldwin, supra.)

The effect of the act was to maintain the competitive position of the two classes of dealers in the same condition which existed before the enactment. Before the enactment, any person could go into the milk business at any time and sell his milk at any price at which he chose to sell it. The result had been that small dealers would attempt to break into the business by underselling which usually resulted in financial disaster to themselves and to the farmers from whom they had purchased their milk on credit. It also resulted in a general tendency to keep the price of milk paid to farmers down to a point where it demoralized the whole milk business. The primary purpose of the Legislature was to correct that condition by the establishment of a uniform fair price at which milk could be sold. We have held that the act in that respect was constitutional [fol. 100] (People v. Nebbia, supra), although its practical effect would be, without the differential clause, to prevent new dealers from entering the field, as no new dealer could hope successfully to compete with the established advertised dealers selling well-known advertised brands.

Appellant does not question the power of the Legislature to provide for the fixing of a uniform price for the sale of milk, but argues that when it provided for fixing a uniform price and then because of the factual situation provided for a differential in favor of those unadvertised dealers then engaged in the business, it thereby in effect prohibited all others from engaging in the business as unadvertised dealers and exceeded its power. It urges that such limitation has no reasonable relation to the main purpose of the act but constitutes an arbitrary, discriminatory and unreasonable limitation which denies to it the equal protection of the law.

If the Legislature believed the limitation had a reasonable relation to the purpose which it desired to accomplish by the enactment and the facts reasonably justified that belief, then it acted within its jurisdiction and it is not for the courts to determine that it acted unwisely, although the effect of its action may deprive the appellant and others so situated from engaging in the milk business as unadvertised dealers during the emergency period specified in the act.

The Legislature in effect provided that all milk dealers must sell at a uniform price, but owing to the factual situation it also provided that those engaged in the business as unadvertised dealers at the date of the original enactment should have the benefit of the differential. The act does not prevent by its terms others from engaging in the business provided they sell at the uniform price, neither does it prevent others from becoming unadvertised dealers. It only has that effect during the period of the emergency specified in the act. We believe that the Legislature could have rea- [fol. 101] sonably determined from the facts before it that new competition in the unadvertised class of dealers during the emergency period would have an injurious effect upon the result which it attempted to accomplish by the enactment.

It had before it evidence of the disastrous effect of unlimited competition in the business at the time of the enactment and prior thereto. It was attempting to stabilize the industry during a limited period only and it had the authority to enact any law which it deemed advisable to accomplish that purpose, provided the law so enacted had a reasonable relation to that purpose.

The act not only had the effect of limiting to those engaged in the unadvertised milk business at the date of the first act the privilege of the differential, but it also prevented the large holding companies, known as advertised dealers, from dissolving those companies and permitting the subsidiary corporations thereof from engaging in the sale of milk in competition with the unadvertised dealers and enjoying the privilege of selling at one cent per quart less than the uniform price. It might reasonably anticipate such action on the part of the large holding companies. It might also reasonably foresee that such action would result in driving unadvertised dealers from the field, with great financial loss to them and to thousands of farmers who were dependent upon them for a market for their milk, thus tending to defeat the very purpose which the differential clause was enacted to prevent.

"The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people" (Pp. 538, 539). "If one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." (Nebbia v. New York, 291 U. S. 502, 534.)

We believe that the provision of the statute in question has a reasonable relation to the legislative purpose which [fol. 102] was in itself legal and that it is neither arbitrary nor discriminatory.

The order should be affirmed, with costs.

Dissenting Opinion

Finch, J. (dissenting):

Assuming but not deciding that the unadvertised differential provision is constitutional, is the provision limiting its application to dealers in the field "since April 10, 1933," reasonably adapted to the end to be accomplished, or does it go further and infringe arbitrarily and unreasonably upon the rights of the appellant and other dealers who have entered the business since that time and deny to them the equal protection of the laws? It is true that in a highly-organized society the liberty of each individual must yield to the public need when it appears that the interest of the public generally, as distinguished from that of a particular

class, requires it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive. (Lawton v. Steele, 152 U. S. 133, 137; Colon v. Lisk, 153 N. Y. 188, 196; Wright v. Hart, 182 N. Y. 330.) To sustain such legislation under the police power, the courts must be able to find that it tends in some degree to prevent an evil or to preserve public health, morals, safety or welfare. When no such tendency is disclosed and the legislation impinges upon the liberty and interferes with the property of private citizens, the duty of the courts is to declare it invalid for undue interference with the right of a person to pursue unmolested and without unreasonable regulation any lawful calling which he may choose, has always been condemned under our form of government. (Lochner v. New York, 198 U. S. 45.)

When we approach the case at bar from the standpoint of an individual who desires to enter the milk business, we find that the door is effectively closed to him. Denying the individual the price differential is as effective as a direct prohibition.

[fol. 103] Mr. Justice Cardozo, in discussing the same Milk Control Law in Hegeman Farms Corp. v. Baldwin (293 U. S. 163, 169), said:

"What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant [an unadvertised dealer] is able to charge." (Words in brackets inserted.)

The basic purpose of the Milk Control Law was to afford protection and assistance to the farmers. The only claimed reason for the price differential was to prevent the price fixing provisions forcing the unadvertised dealer out of business, leaving complete control in the hands of the advertised dealers. The limitation on the number of unadvertised dealers, however, is of no benefit to the farmer, nor does it tend to preserve the status quo, or protect competitive conditions or opportunities existing just prior to the enactment of the Milk Control Law. On the contrary, this time provision limits the field of distribution for the farmer by limiting the number of independent dealers. Nor does the requirement in any way tend to prevent monopolistic control by the advertised dealers.

It is claimed that the differential in price is necessary for the preservation of the independent milk distributor for, if the price charged by all were the same, those doing business under a well-advertised name would tend to absorb the entire market. When the Legislature went further and conferred the additional benefit of a monopoly on those unadvertised dealers already in the business by preventing any newcomer from entering, they gave an advantage to the independent dealer which went far beyond the requirements of the circumstances. It transforms the provision from one aimed to prevent a monopoly by the well-advertised dealers into one creating a monopoly by the unadvertised dealers.

On the one hand, by the differential an attempt is made to preserve competitive conditions as they existed before the statute, and yet, on the other hand, it abolishes and [fol. 104] wipes out competitive conditions by prohibiting the normal and natural emergence of new dealers into the field. This provision might have provided for one set of qualifications for milk dealers who were engaged in business prior to April 10, 1933, and another and more stringent set for those who came in thereafter. The Legislature might have provided for stricter regulations concerning different classes of milk dealers. (Watson v. Maryland, 218 U. S. 173; People v. Griswold, 213 N. Y. 92; Spector v. Building Inspector, 250 Mass. 63.) The regulations could be validly based on conditions, as for example, the grades of milk sold, and the character of distribution. To prescribe qualifications for entrance into the business or to prescribe regulations covering the different classes, is entirely different from proscribing, in effect, the right to engage in such business altogether. The record shows that the identical brand of milk sold by appellant is sold by several other independent milk dealers, competitors of appellants, to the same class of retailers in the same stores and on the same streets. Why should the appellant have to charge one cent more per quart for his milk than his competitors charge? The appellant is in the same class with these competitors. Why the unfair discrimination? Without any apparent justification it discriminates between one entering the milk business prior to April 10, 1933, and a dealer entering on the next day. One looks in vain to find a reason for this discrimination. The only reason given is

that the Legislature did not wish to increase or intensify the competition against the advertised dealers by permitting new dealers to join the class of the unadvertised dealers. In other words, a monopoly was given to the unadvertised dealers so as not to increase the competition against the advertised dealers. Is it not apparent that this reason is in fact no reason at all and is only given in an attempt to justify an unjustifiable discrimination? Another reason given is that the advertised dealers might per- [fol. 105] mit their subsidiaries to enter the field of the independent dealer. As the only justification for the differential against the advertised dealer is the potent sales appeal of the well-advertised name, no reason remains when the company sells the milk under another name. Thus does the monopoly given to the independent dealers stand without justification or reason.

Peculiarly applicable to the case at bar is the language which appears in Matter of Pell (171 N. Y. 48, at p. 59):

"The learned counsel for the appellant states a very apt illustration in his brief, as follows: 'We often hear it declared that the legislature may designate watches and carriages as a class of property and subject the same to the payment of duties and taxes, but would anyone claim that a law declaring that all watches or carriages which were purchased prior to June 30, 1885, should be appraised and taxed could be sustained upon the ground that such law merely designated a class of property for taxation?' Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification."

Just as watches are watches and carriages are carriages, regardless of when acquired, so are milk dealers selling unadvertised brands of milk, milk dealers selling unadvertised brands of milk, regardless of when they entered the milk business. If this time provision is valid then a similar provision would be valid which designates more exactly those intended to be benefited. Also such a monopolistic class as named by this statute will tend continually to become narrower and thus destroy itself and tend to play more into the hands of the advertised dealers because of this very provision shutting the door absolutely against

new-comers in the field. Therefore, the general public will suffer from this monopoly given to the independent dealer.

Thus the statute by reason of the insertion of this time limitation not only makes a present of a monopoly to the [fol. 106] independent dealer, but in addition is foreign to the purpose of the law, which is alleged to be an attempt to preserve competitive conditions.

The presumption which attaches in favor of legislative action is of no avail where it is evident that the classification established by the statute is arbitrary. (Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 209, 210; Smith v. Cahoon, 283 U. S. 553; Southern Ry. Co. v. Greene, 216 U. S. 400, 417.)

Although the time limitation clause is unconstitutional as denying to the appellant the equal protection of the laws, this does not require that the entire provision be declared a nullity. The section contained a separability clause and it is only necessary to delete the offending clause, viz., "since April 10, 1933." With the arbitrary time limitation excised from the unadvertised differential provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well-advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded.

The order of confirmation of the Appellate Division should be reversed and the determination of the respondents should be annulled.

Lehman, Crouch and Loughran, JJ., concur with Hubbs, J.; O'Brien, J., concurs in result on the authority of People v. Nebbia (262 N. Y. 259; affd., 291 U. S. 502); Finch, J., dissents in opinion, in which Crane, Ch. J., concurs.

Order affirmed.

[fol. 107] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER ON REMITTITUR—April 20, 1935

The above named petitioner, Mayflower Farms, Inc., having appealed from a determination of the defendants-respondents made by official order dated the 9th day of July, 1934, denying the petitioner-appellant's application for a milk dealer's license pursuant to the provisions of Chapter 126 of the Laws of 1934, and the said petitioner having on the 27th day of July, 1934, obtained from this Court an order of certiorari which said order was thereafter duly entered in the office of the Clerk of the County of Albany on the 17th day of August, 1934, and the defendants having duly made their return thereto, and the matter having come on to be heard and argued before the Appellate Division, Third Department, at a term thereof held in the City of Albany on the 22nd day of September, 1934, and the said Appellate Division having confirmed the determination of the defendants, with $50.00 costs, and an order to that effect having been duly entered on the 3rd day of November, 1934, and an appeal having been taken to the Court of Appeals and said Court having heard said appeal and having ordered and adjudged that the order so appealed from be affirmed with costs,

[fol. 108] Now, therefore, upon the remittitur of the said Court of Appeals and upon motion of Henry S. Manley, Esq. (Robert G. Blabey, Esq., of counsel), attorney for the defendants, it is hereby ordered, adjudged and decreed that the said judgment of the Court of Appeals be and the same is hereby made the order and judgment of this Court, and that the said determination of the defendants, dated July 9, 1934, denying petitioner's application for license as aforesaid, be and the same is hereby affirmed, with the costs of this appeal against the petitioner to be taxed.

Enter.

Gilbert V. Schenck, J. S. C.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 109] IN SUPREME COURT OF NEW YORK,
ALBANY COUNTY

In the Matter of the Application of MAYFLOWER FARMS, INC., Petitioner,

for a Certiorari Order against

CHARLES H. BALDWIN, Commissioner of the Department of Agriculture and Markets of the State of New York, and Kenneth Fee, Director of the Division of Milk Control and Department of Agriculture and Markets of the State of New York, Defendants

JUDGMENT ON REMITTITUR

The above named petitioner, Mayflower Farms, Inc., having appealed from a determination of the defendants made by official order dated the 9th day of July, 1934, denying the petitioner's application for a milk dealer's license pursuant to the provisions of Chapter 126 of the Laws of 1934, and the said petitioner having on the 27th day of July, 1934, obtained from this Court an order of certiorari, which said order was thereafter duly entered in the office of the Clerk of the County of Albany on the 17th day of August, 1934, and the defendants having duly made their return thereto, and the matter having come on to be heard and argued before the Appellate Division, Third Department, at a term thereof held in the City of Albany on the 22nd day of September, 1934, and the said Appellate Division having confirmed the determination of the defendants with $50.00 costs, and an order to that effect having been duly entered on the 3rd day of November, 1934, and an appeal having been taken to the Court of Appeals and that Court having heard said appeal and having ordered and adjudged that the order so appealed from be affirmed with costs,

And the record remitted from the Court of Appeals having been duly filed in the Albany County Clerk's office on the 20th day of April, 1935, and an order having been duly made, and entered thereon the same day making the judgment and order of the Court of Appeals the judgment [fol. 110] and order of this Court and directing the entry of a judgment of affirmance herein, together with the costs of said appeal against the said petitioner to be taxed, now,

on motion of Henry S. Manley, Esq. (Robert G. Blabey, Esq., of counsel), attorney for the defendants,

It is adjudged that the order of the defendants dated the 9th day of July, 1934, denying petitioner's application for a milk dealer's license, pursuant to the provisions of Chapter 126 of the Laws of 1934, be and the same is hereby affirmed, and

It is further adjudged that the defendants herein recover of the petitioner herein the sum of One Hundred Seventy-One Dollars and Ninety-Five Cents ($171.95), the amount of their costs herein as taxed and have execution against the said petitioner therefor.

John A. Knox, Clerk.

Dated at the City of Albany, New York, this 26th day of April, 1935.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 111] In Supreme Court of the United States, October Term, 1935

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal

The above-named Mayflower Farms, Inc., considering itself aggrieved by the order and judgment of the Supreme Court of Albany County, entered upon the remittitur and the final decision of the Court of Appeals of the State of New York, handed down April 16, 1935, in this cause, which said court is the highest court of the State of New York in which a decision in this suit and matter could be had, hereby prays that an appeal by this appellant be allowed herein to the Supreme Court of the United States to the end that said order and judgment and the decision of the said Court of Appeals upon which the same were entered may be there reviewed and considered and justice done this appellant, and that an order be made allowing such appeal, fixing the amount of the bond required of the appellant herein on such appeal and staying and restraining the appellees, their agents, servants and employees, during the

pendency and until the final determination of such appeal by the Supreme Court of the United States, from instituting any proceeding or bringing any action to execute, carry out or enforce the order of said appellees, dated July 9, 1934, denying appellant's application for a milk dealer's [fol. 112] license upon the ground that appellant unlawfully exercised the one cent per quart underselling privilege conferred upon unadvertised dealers of milk in cities having a population of one million or more by section 258-q of the Agriculture and Markets Law of the State of New York, and the order and judgment of the Supreme Court of Albany County from which an appeal is herein sought confirming said order of said appellees, provided, however, that appellant shall comply with all of the provisions of the Agriculture and Markets Law of the State of New York and of the rules and orders of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York, as though it were in fact licensed as a milk dealer, excepting only so much of the last sentence of section 258-q of the said Agriculture and Markets Law as prevents the appellant from exercising the one cent per quart underselling privilege hereinbefore mentioned.

Assignment of Errors

The appellant, Mayflower Farms, Inc. assigns the following errors in the record and proceedings had in this case:

The Court of Appeals erred:

1. In holding that the time limitation created by the words "since April tenth, nineteen hundred thirty-three" contained in the last sentence of section 258-q of the Agriculture and Markets Law of the State of New York, which prevents the appellant from exercising the one cent per quart underselling privilege conferred by such sentence upon milk dealers selling unadvertised brands of milk in cities having a population of one million or more, was neither arbitrary nor discriminatory and did not deny to the appellant the equal protection of the laws and the due process guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

2. In holding that such time limitation had a reasonable relation to the legislative purpose underlying the milk con-

trol laws of the State of New York and, consequently, that [fol. 113] its inclusion in the "unadvertised differential" provision by the Legislature was a valid exercise of the police power of the State.

3. In holding that there were facts before the Legislature of the State of New York which justified the inclusion of such time limitation in the "unadvertised differential" provision.

4. In affirming the order of the Appellate Division which confirmed the determination and order of the appellees denying the appellant's application for a milk dealer's license on the ground that appellant had unlawfully exercised the one cent per quart underselling privilege conferred by the "unadvertised differential" provision.

5. In failing to hold that the time limitation hereinbefore mentioned was arbitrary, discriminatory and unreasonable and denied the appellant due process and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, and in failing to hold that such limitation could be exercised from the milk control law of the State of New York.

6. In failing to reverse the order of the Appellate Division and in failing to annul the determination and order of the appellees on the ground that so much of the milk control law as furnished the basis for their denial of the appellant's application for a milk dealer's license, under Chapter 126 of the laws of 1934, was unconstitutional, void and of no force and effect whatsoever.

Prayer for Reversal

Because of the foregoing errors, the appellant, Mayflower Farms, Inc., prays that the said order and judgment of the Supreme Court of the State of New York and that the said decision of the Court of Appeals of the State of New York, upon which said order and judgment were entered, in the above-entitled cause, be reviewed by the Supreme Court of [fol. 114] the United States and reversed and judgment rendered in favor of the appellant, with costs in all courts.

Max Cohen, Seymour Ellenbogen, Counsel for Appellant, 75 State St., Albany, N. Y. Seymour Ellenbogen, Bernard Ellenbogen, of Counsel.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 115] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above-entitled suit having prayed for the allowance of an appeal herein to the Supreme Court of the United States from the order and judgment of the Supreme Court of the State of New York, entered in the office of the Clerk of Albany County April 20, 1935, and April 26, 1935, respectively, upon the remittitur and final decision of the Court of Appeals of the State of New York, handed down April 16, 1935, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction on appeal pursuant to the statutes of the United States and the Rules of the Supreme Court of the United States, it is

Ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided by law, and it is further

Ordered that the Clerk of the Supreme Court of the County of Albany and State of New York, to which court the record herein has been remitted, shall prepare and certify a transcript of the record, proceedings, order and [fol. 116] judgment in this cause and transmit the same to the Supreme Court of the United States, so that the transcript shall reach said Court within forty days of the date of this order; and it is further

Ordered that, pending the final determination by the Supreme Court of the United States of the appeal hereby allowed, the appellees, their agents, servants and employees be, and they hereby are, stayed and restrained from instituting any proceeding or bringing any action to execute, carry out or enforce the order of the appellees, dated July 9, 1934, denying appellant's application for a milk dealer's license and the order and judgment of the Supreme Court of the State of New York, confirming said order, provided, however, that appellant shall comply with all of the provisions of the Agriculture and Markets law of the State of New York and with all of the rules and orders of the Division of Milk Control of the Department of Agriculture and Markets of the State of New York as though it were in fact duly licensed as a milk dealer, excepting only so much

of the last sentence of section 258-q of the Agriculture and Markets law as prevents the appellant from exercising the one cent per quart underselling privilege conferred by such sentence upon dealers selling unadvertised milk in cities having a population of more than one million; and it is further

Ordered that security for costs and damages herein be fixed in the sum of 500 dollars.

Dated July 10, 1935.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York. (Seal County of Albany, July, 1841.)

Clerk's certificate to foregoing paper omitted in printing.

[fols. 117 & 118] Bond on Appeal for $500.00, approved and filed July 31, 1935, omitted in printing.

[fol. 119] Citation in usual form, showing service on Henry S. Manley, filed July 12, 1935, omitted in printing.

[fol. 120] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed July 31, 1935

It is hereby stipulated between appellant and appellees herein, by their respective counsel, and the said counsel hereby indicate as the portions of the record to be included in the transcript herein, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, the following papers:

(Omit statement under Rule 234, Orig. Record, pp. 1 and 2.)

Order of Certiorari, Orig. Record, pp. 3, 4, 5 and 6.

Notice of Application for Certiorari Order, Orig. Record, pp. 6 and 7,

Petition of Mayflower Farms, Inc., Orig. Record, pp. 7 to 14 inclusive.

(Omit verification of Bertha Silberman, pp. 14 and 15, Orig. Record.)

(Omit answering affidavit in opposition to application for stay, Orig. Record, pp. 15 to 19 inclusive.)

Return to Order of Certiorari, pp. 19 to 22 inclusive, Orig. Record.

Exhibits annexed to return, as follows:

Exhibit No. 2, Application for milk dealer's license, Orig. Record, pp. 22 to 33 inclusive.

(Omit corporate acknowledgment, Orig. Record, p. 33.)

Exhibit No. 1, Notice of hearing, Orig. Record, pp. 34, 35 and 36.

[fol. 121] (Omit official return receipt of post-office Department, Orig. Rec. p. 37.)

Exhibit No. 3, list of customers of Mayflower Farms, Inc., Orig. Rec., pp. 38 and 39.

(Omit Exhibit No. 4, official order revoking license of Mayflower Farms, Inc., under 1933 Milk Control Law, Orig. Rec., pp. 40 and 41.)

(Omit Exhibit No. 5, Order of Appellate Division dismissing appeal from revocation order under the 1933 Milk Control Law, Orig. Rec., pp. 42, 43 and 44.)

Exhibit No. 6, sample of cap used on Mayflower Farms, Inc., milk bottles, Orig. Rec., p. 45.

Transcript of minutes of hearing held June 18, 1934, Orig. Rec., pp. 45 to 80 inclusive.

Memorandum of J. W. Harnach recommending refusal to grant a license, Orig. Rec., pp. 81 and 82.

Memorandum of Robert G. Blabey, Assistant Counsel to the Department of Agriculture and Markets, transmitting recommendation of J. W. Harnach to Director Kenneth F. Fee, Orig. Rec., p. 82.

Memorandum of Mr. Fee directing preparation and service of an order denying the Mayflower Farms, Inc., application for a license, Orig. Rec., p. 83.

Official Order denying appellant's application for milk dealer's license, dated July 9, 1934, Orig. Rec., pp. 84 and 85.

(Omit Stipulation of substitution of attorneys for Mayflower Farms, Inc., Orig. Rec., pp. 85 and 86.)

(Omit Stipulation settling case and consent that same be filed, Orig. Rec., pp. 86 and 87.)

(Omit Stipulation waiving certification, Orig. Rec., p. 87.)

Notice of appeal to Court of Appeals, Orig. Rec., pp. 88 and 89.

Order of confirmation of the Appellate Division, Orig. Rec., pp. 90 and 91.

Affidavit of no opinion, except dissenting memorandum by Hill, P. J., Orig. Rec., pp. 91 and 92.

(Omit stipulation waiving certification of record to Court of Appeals, Orig. Rec., p. 93.)

Remittitur of the Court of Appeals.

Order of Affirmance of Hon. Gilbert V. Schenck, dated April 20, 1935.

Judgment of Affirmance, Supreme Court, Albany County, entered April 26, 1935.

Prevailing and dissenting opinions of the Court of Appeals.

[fol. 122] Order allowing appeal to the Supreme Court of the United States.

Petition for Appeal, assignment of errors and prayer for reversal.

Statement as to jurisdiction on appeal, and opposing statement, pursuant to Rule 12 of the Rules of the Supreme Court of the United States.

Bond on Appeal.

Citation and Return thereon.

Stipulation as to transcript of record.

Dated Albany, N. Y., July 31, 1935.

Seymour Ellenbogen, Attorney for Appellant.
Henry S. Manley, Attorney for Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 122a] Due and personal service of the within Stipulation is admitted this 31 day of July, 1935.

Henry S. Manley, Attorney for Appellees.

[fol. 123] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 8, 1935

SIR:

Please take notice that the within is a true copy of the appellant's statement of points to be relied upon, and designation of the parts of the record to be printed.

Dated, Albany, N. Y., August 6th, 1935.

Yours, etc., Seymour Ellenbogen, Attorney for Appellant, Office and Post Office Address, 75 State St., Albany, N. Y.

To: Henry S. Manley, Esq., Counsel for Appellees, State Office Bldg., Albany, N. Y.

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely herein are the same as the six items listed in the Assignment of Errors heretofore filed.

[fol. 124] And the appellant further states that it considers that the parts of the record necessary for the consideration of this cause are all the same parts listed in the stipulation as to transcript of record heretofore filed herein and therein indicated as the portions of the record to be included in said transcript.

Max Cohen, Seymour Ellenbogen, Counsel for Appellant.

[fol. 125] STATE OF NEW YORK,
City and County of Albany, ss:

Lillian D. Campagna, being duly sworn, deposes and says: I am over the age of 21 years; that on the 6th day of August, 1935, I served the annexed statement of points to be relied upon, and designation of the parts of the record to be printed, pursuant to paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, upon Henry S. Manley, Esq., counsel for the appellees herein, by depositing in a United States post office a copy of said statement and designation securely enclosed in a sealed and postpaid wrapper addressed to the said Henry S. Manley, at the State Office Building, Albany, N. Y.

Deponent further states that she caused the said sealed and postpaid wrapper so addressed to be sent by registered mail and that in the usual course of delivery said statement and designation will be delivered to the said addressee on August 7, 1935.

Lillian D. Campagna.

Sworn to before me this 6th day of August, 1935. Bernard Ellenbogen, Com'r of Deeds, Albany, N. Y.

[fol. 126] [File endorsement omitted.]

Endorsed on cover: File No. 39,903. New York, Supreme Court. Term No. 349. Mayflower Farms, Inc., Appellant, vs. Charles H. Baldwin, Commissioner of the Department of Agriculture and Markets of the State of New York, et al. Filed August 7, 1935. Term No. 349, O. T. 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 349

MAYFLOWER FARMS, INC.,
Appellant,

v.

CHARLES H. BALDWIN, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

MAX COHEN,
Counsel for Appellant.

SEYMOUR ELLENBOGEN,
BERNARD ELLENBOGEN,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	2
The statute of the State, the validity of which is involved	3
Date of judgment and order sought to be reviewed and date of application for appeal	4
Nature of case and basis of jurisdiction	4
Cases believed to sustain the jurisdiction	6

Table of Cases Cited.

Borden's Farm Products Company, Inc., v. Baldwin et al., 293 U. S. 194	6, 7, 8
Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene Co., Pa., 284 U. S. 23	6
Great Northern Railway Co. v. Minnesota, 278 U. S. 503	6
King Manufacturing Co. v. Augusta, 277 U. S. 100 (1928)	6
Mayflower Farms, Inc., v. Baldwin, etc., et al., 267 N. Y. 9	6
Nashville, C. & St. L. Ry. Co. v. White, 278 U. S. 456	6
Nebbia v. New York, 291 U. S. 502	6, 7

Statutes Cited.

Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, effective May 13, 1925, amending and re-enacting Section 237(a) of the Judicial Code (U. S. Code Annotated, Title 28, Section 344)	2, 8
Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, U. S. C. A., Title 28, Section 861a	2
Act of April 26, 1928, Chapter 440, 45 Stat. 466, amending Section 2 of the Act of January 31, 1928, Public, numbered 10, Seventieth Congress	2
Agriculture and Markets Law of the State of New York, Article 21-A, Section 258-q (Laws of New York, 1934, Official Volume, p. 580)	3
Constitution of the United States, 14th Amendment	6
New York State Milk Control Law (Articles 21 and 21-A of the Agriculture and Markets Law of the State of New York, as added by Chapter 126 of the Laws of 1934) (Laws of New York, 1934, Official Volume, p. 564)	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 349

MAYFLOWER FARMS, INC.,

Appellant,

v.

CHARLES H. BALDWIN, COMMISSIONER OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, AND KENNETH F. FEE, DIRECTOR OF THE DIVISION OF MILK CONTROL AND DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THIS HONORABLE COURT:

The appellant, in compliance with paragraph 1 of Rule 12 of the Rules of this Court, in support of the jurisdiction of this Honorable Court to review the above entitled cause on appeal, respectfully shows:

A. **Statutory Provision Sustaining Jurisdiction.**

The Act of Congress of February 13, 1925, Chapter 229, section 1, 43 Stat. 936, effective May 13, 1925, amending and reenacting Section 237 (a) of the Judicial Code (U. S. Code Annotated, Title 28, Section 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ".

The Act of Congress of January 31, 1928, Chapter 14, section 1, 45 Stat. 54, U. S. C. A. Title 28, Sec. 861a, provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, amending section 2 of the Act of Congress of January 31, 1928, Public, numbered 10, Seventieth Congress, hereinbefore cited, provides:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and

of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B. The Statute of the State, the Validity of Which is Involved.

The statute of the State, containing the four words which are challenged as unconstitutional in this case, is familiarly known as the New York State Milk Control law. It is embodied in articles 21 and 21-A of the Agriculture and Markets Law of the State of New York, as added by Chapter 126 of the Laws of 1934 (Laws of New York, 1934, Official Volume, p. 564).

The only part of the statute involved herein which is challenged as unconstitutional is the time limitation created by the words "since April tenth, nineteen hundred thirty-three" which are found in the following quoted last sentence of section 258-q of article 21-A of the Agriculture and Markets Law of the State of New York (Laws of New York, 1934, Official Volume, p. 580):

> "It shall not be unlawful for any milk dealer who *since April tenth, nineteen hundred thirty-three* has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city".

C. Date of Judgment and Order Sought to be Reviewed and Date of Application for Appeal.

The order and judgment of the Supreme Court, Albany County, of the State of New York, sought to be reviewed herein, were entered upon the remittitur and the decision of the Court of Appeals of the State of New York handed down April 16, 1935. A motion for reargument was made by the Appellant herein on April 29, 1935, and was returnable before the Court of Appeals on May 6, 1935. The motion was denied without opinion on May 28, 1935. On July 9, 1935, a petition for allowance of appeal to the Supreme Court of the United States was filed with the Chief Judge of the Court of Appeals.

D. Nature of Case and Basis of Jurisdiction.

The appellant, Mayflower Farms, Inc., is a New York State corporation organized in May, 1933. On or about April 28, 1934, it made an application to the Department of Agriculture and Markets of the State of New York for a milk dealer's license. After a hearing held upon said application, an order was made by the appellees on July 9, 1934, denying appellant's application for the sole reason that appellant had allegedly sold its milk at what is known as the "unadvertised" price (which is one cent per quart lower than the price fixed for the sale of milk having a well advertised trade name) and that although the appellant was concededly an unadvertised milk dealer selling an unadvertised brand of milk it was, nevertheless, not entitled to exercise the one cent per quart underselling privilege conferred by the statute (quoted under B hereof) upon sellers of unadvertised milk simply because it entered the milk business one month after April 10, 1933, the date specified in the statute.

Were it not for the words "since April tenth, nineteen hundred thirty-three" the appellant would assume its rightful place in the class of dealers selling unadvertised milk and would be entitled to exercise the one cent per quart underselling privilege.

The appellant obtained, by order of certiorari, a review of the order of the appellees denying appellant's application and a stay of the enforcement of appellees' order on the ground that the time limitation which prevented the appellant from enjoying and exercising the underselling privilege was arbitrary and discriminatory upon its face and denied to the appellant due process and equal protection of the laws in violation of the fourteenth amendment to the Constitution of the United States.

The Appellate Division of the Supreme Court, by a divided court, confirmed the order of the appellees and held the time limitation to be valid. No opinion was written, but Presiding Justice Hill wrote a short but sharp dissenting memorandum as follows:

"HILL, P. J.:

"I dissent. This petitioner began business as a milk dealer in the City of New York on May 28, 1933. The statute in effect requires that a dealer beginning business after April 10, 1933 shall sell its milk for one cent a quart more than a dealer who was in business before April 10, 1933 received for the same grade of milk. This as effectively prevents a person from beginning business as though the statute in terms contained a direct prohibition. The reasonableness of the regulations prescribed by the Legislature in the milk emergency is subject to court review. A court may consider "the legitimacy of the conclusions drawn from the facts found". (*People* v. *Nebbia*, 262 N. Y. 259, 268.) The facts before the Legislature did not justify giving a monopoly to dealers in business on April 10, 1933. Petitioner's constitutional right to engage in a lawful business has been abridged."

The Court of Appeals, by a divided court, likewise found the time limitation to be valid and accordingly affirmed the order of the Appellate Division. The prevailing and dissenting opinions of the Court of Appeals are reported at 267 N. Y. 9. A motion for reargument of the case in the Court of Appeals was denied without opinion. The Court of Appeals of the State of New York is the highest court of the State in which a decision in the suit could be had.

E. Cases Believed to Sustain Jurisdiction.

Many cases could be cited by appellant to sustain the jurisdiction of this Court to review the final decision of the Court of Appeals in this cause. Inasmuch as the appellant immediately invoked the guarantees given it by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, the Federal question involved is obvious. The question was duly presented; its decision was essential to the determination of the controversy, and it was actually decided by the courts of the State of New York, although adversely to the appellant's contention.

The following cases in this Court are only a few of the many that could be cited as sustaining the jurisdiction of this Court in this cause:

King Manufacturing Co. v. *Augusta,* 277 U. S. 100 (1928);

Nashville C. & St. L. Ry. Co. v. *White,* 278 U. S. 456;

Great Northern Railway Co. v. *Minnesota,* 278 U. S. 503;

Cumberland Coal Co. v. *Board of Revision of Tax Assessments in Greene Co., Pa.,* 284 U. S. 23;

Nebbia v. *New York,* 291 U. S. 502;

Borden's Farm Products Company, Inc., v. *Baldwin et al.,* 293 U. S. 194.

In *Nebbia* v. *New York, supra,* the right of the State of New York to fix the prices at which milk could be sold in the State of New York was involved in an attack made by Nebbia upon the unconstitutionality of the first milk control law of the State of New York. This law was substantially the same as the milk control law under which the case at bar arises. Jurisdiction of this Court to review the decision of the Court of Appeals therein was virtually conceded.

In *Borden's Farm Products Company, Inc.,* v. *Baldwin et al., supra,* the same statutory provision involved in the case at bar was the subject of attack. In the *Borden* case, however, the entire "unadvertised" differential provision was challenged by the Borden Company as unconstitutional in that it forced the Borden Company and three other large milk dealers, classified by the division of milk control of the State of New York as the well advertised dealers to sell their milk at one cent per quart more than the price fixed for the same grade of milk sold by dealers not having a well advertised trade name.

The position of the appellant in the case at bar is different from that taken by the Borden Company. In this case the appellant concedes the constitutionality of the differential provision in so far as it differentiates between dealers selling milk having a well advertised trade name and those selling milk not having a well advertised trade name. Appellant is entitled to complain only and it complains only of so much of the differential provision as prevents it from exercising the underselling privilege enjoyed by all other sellers of unadvertised milk, viz: The words "since April tenth, nineteen hundred thirty-three." This Court took jurisdiction in the *Borden* case, although it did not decide on the merits the constitutional question therein involved, reserving the determination thereof until a future time when, pursuant to its direction, evidence could be taken concerning trade conditions existing in the milk

business in the City of New York at or prior to the time of the enactment of the first milk control law. Whatever the decision of this Court ultimately will be in the *Borden* case, the appellant respectfully submits that this Court should first review the narrower Federal, constitutional question involved in the case at bar.

By reason of the foregoing, it is respectfully submitted that this honorable Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code.

Respectfully submitted,

MAX COHEN,
Counsel for Appellant.

SEYMOUR ELLENBOGEN,
BERNARD ELLENBOGEN,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1935.

No. 349.

MAYFLOWER FARMS, INC.,

Appellant,

v.

CHARLES H. BALDWIN, Commissioner of The Department of Agriculture and Markets of the State of New York, Et Ano.

Appeal From The Supreme Court of The State of New York.

BRIEF FOR APPELLANT.

MAX COHEN,
Counsel for Appellant.

SEYMOUR ELLENBOGEN,
BERNARD ELLENBOGEN,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Page

Opinions below 1
Statute and constitutional question involved 2
Statement of case 3
Assignment of errors 6
Summary of argument 6
Argument:
I. The time limitation created by the words "since April tenth, Nineteen Hundred Thirty-three" in the unadvertised differential provision, which prevents the Appellant from enjoying and exercising the privilege thereby conferred, is UPON ITS FACE, arbitrary, discriminatory, irrational and unconstitutional and denies to the Appellant due process and the equal protection of the laws guaranteed by the Fourteenth Amendment 7
A. Questions not involved 7
B. The case against the time limitation 9
1. Its origin 11
2. It has no relation to the purposes of the Milk Control Law 12
3. It has no relation to the true and lawful purpose of the unadvertised differential provision 13
4. Its real purpose is to create a monopoly 14
5. Its effect is to prohibit new dealers from entering the field 18
6. It cannot be supported by the argument that it was intended to prevent new and injurious competition; such competition was and is directly and effectively prevented by §258-c which the Court below completely overlooked 19
7. It cannot be supported by the argument that the provision containing it was enacted to preserve the status quo of the milk dealers in business on April 10, 1933 21
8. It cannot be supported by the argument that the well advertised dealers would form unadvertised subsidiaries 22
9. It cannot be supported on emergency grounds 23
10. It cannot be supported as a legitimate exercise of police power 26
11. It is not based on any factual situation 31
12. It is an unusual legislative expedient and its approval will establish a most dangerous precedent 33
II. The Appellant falls naturally into the natural class of unadvertised dealers in the City of New York for whose

Page

benefit the price differential provision was enacted and, as a member of such class, is entitled to exercise the one cent per quart underselling privilege granted by such provision 42

III. The time limitation is separable and may be excised from the unadvertised differential provision without doing violence to the intention of the legislature and without hampering or impairing the effectiveness of the provision or the Milk Control Law. On the contrary, its deletion will carry out the purpose of the provision and of the entire law 58

TABLE OF CASES CITED.

Adams v. Tanner, 244 U. S. 590 19
Alexander v. City of Elizabeth, 56 N. J. L. 71 ..... 54, 55
Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, 149 8
Barbier v. Connolly, 113 U. S. 27 36
Block v. Hirsh, 256 U. S. 160, 168 25
Borden's Farm Products Co. v. Baldwin, 293 U. S. 194; 11 F. Supp. 599; 7 F. Supp. 352 ..... 8, 10, 11, 15, 17, 31, 32, 39, 41, 62
Boyd v. United States, 116 U. S. 616, 635 25
Borgnis v. Falk Co., 147 Wisc. 327, 353, 354 50
Burns Baking Co. v. Bryan, 264 U. S. 504, 513 ..... 19, 35
Champlin Refining Co. v. Commission, 286 U. S. 210, 234 60
Chicago, M. & St. P. Ry. Co. v. Westby, 178 Fed. 619, 625 46
Chicago, K. & W. R. R. Co. v. Pontius, 157 U. S. 209 36
Colon v. Lisk, 153 N. Y. 188, 196 26
Connolly v. Union Sewer Pipe Company, 184 U. S. 540 28
Coppage v. Kansas, 236 U. S. 1 31
Connolly v. U. S. P. Co., 184 U. S. 540 36
Cook Coffee Co. v. Village of Flushing, 267 Mich. 131 48
Davis Construction Co. v. Board, 192 Ind. 144 51
Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 278 61
Fairmount Co. v. Minnesota, 274 U. S. 1, 9-11 35
Fisher Co. v. Woods, 187 N. Y. 90 19
Fountain Park Co. v. Hensler, et al., 199 Ind. 95 ..... 46, 47
Gulf Col. & S. F. Ry. v. Ellis, 165 U. S. 150 36
Hauser v. N. B. & Merc. Ins. Co., 206 N. Y. 455, 461-5 ..... 25, 58
Hegeman Farms Corporation v. Baldwin, 293 U. S. 163, 169 18
Johnson v. City of Milwaukee, 88 Wisc. 383, 390-392 50
Lawton v. Steele, 152 U. S. 133, 137 26
Liggett Co. v. Baldridge, 278 U. S. 105, 113 35
Lindsley v. Natural Car. Gas Co., 220 U. S. 61 36
Lochner v. New York, 198 U. S. 45 27
Louisville & N. R. Co. v. Railroad Comr. of Tennessee, 19 F. 679, 695 ..... 52, 53
Milligan, ex parte, 4 Wall. 2, 120 25
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 294 36

Page

Meyer v. Nebraska, 262 U. S. 390, 399-400 ..... 19, 35
Miss. Pa. Ry. Co. v. Mackey, 127 U. S. 205 36
Minn. & St. Louis Ry. Co. v. Herrick, 127 U. S. 210 36
Musco v. United Surety Co., 196 N. Y. 459 36
Nebbia v. New York, 291 U. S. 502, 521 ..... 7, 32, 39
Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74 35
New York Ice Co. v. Liebman, 285 U. S. 262 37
Nichols v. Walter, 37 Minn. 264, 271 ..... 50, 51
Northwestern National Insurance Co. et al. v. Fishback, 130 Washington 490 56
Pabst Corporation v. Milwaukee, 190 Wisc. 349 56
Pavonia Horse Railroad Co. v. Jersey City, 45 N. J. L. 297 55
People v. Beakes Dairy Co., 222 N. Y. 417 19
People ex rel. Tyroler v. Warden, etc., 157 N. Y. 116 19
People v. Ringe, 197 N. Y. 143, 149-51 ..... 25, 58
People v. Griswold, 213 N. Y. 92 27
Pierce v. Society of Sisters, 268 U. S. 510, 534-535 35
Pacific Ry. Co. v. Humes, 115 U. S. 572 36
Power Manufacturing Co. v. Saunders, 274 U. S. 409, 493 36
People v. Reardon, 184 N. Y. 431 36
People v. Mensching, 187 N. Y. 8 36
People ex rel. Williams, etc. v. Metz, 193 N. Y. 148, 164-5 36
People v. O. C. R. C. Co., 175 N. Y. 84 36
People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 60 60
People v. Kenney, 96 N. Y. 303 61
People v. Briggs, 50 N. Y. 566 61
Schlesinger v. Wisconsin, 270 U. S. 230 19
Southern Rwy. Co. v. King, 217 U. S. 524, 534 8
Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502 27
Southern Ry. Co. v. Greene, 216 U. S. 400, 417 36
St. John v. New York, 201 U. S. 633 36
Soon Hing v. Crowley, 113 U. S. 703 36
Smith v. Cahoon, 283 U. S. 553 39
Standard Oil Co. of N. J. v. City of Charlottesville, 42 Fed. (2d) 88 43
State v. Whitcom, 122 Wisc. 110 44
State ex rel. Kellogg v. Currens, 111 Wis. 431, 434 45
State v. Hinman, 65 N. H. 103 49
State ex rel. Resch v. Trustees, 121 Wisc. 44, 54 50
Servonitz v. State, 133 Wisc. 231, 238 50
State v. Post, 55 N. J. L. 264 55
State ex rel. Pierson v. O'Connor, 54 N. J. L. 36 55
Stahl v. Trenton, 54 N. J. L. 444 55
Southeastern Electric Co. v. City of Atlanta, 179 Georgia 514 58
Sutton v. State, 96 Tenn. 696 56
Truax v. Corrigan, 257 U. S. 312, 333 29
Tugman v. City of Chicago, 78 Ill. 405 ..... 53, 54
U. S. Automobile Service Club v. Winkle, 128 Oregon, 274 ..... 47, 48
Utah Power & Light Co. v. Pfost, 286 U. S. 165, 185-6 60

Page

Village of Middletown, 82 N. Y. 202 61
Wacholder, ex parte, 1 Cal. App. (2d) 260 ..... 48, 49
Watson v. Maryland, 218 U. S. 173 27
Weaver v. Palmer Bros., 270 U. S. 402, 415 ..... 19, 35
Wright v. Hart, 182 N. Y. 330 26
Yick Wo v. Hopkins, 118 U. S. 356 38

TABLE OF STATUTES CITED.

Articles 21 and 21-A, Agriculture & Markets Law of New York State, as added by Chapter 126 of Laws of 1934 (Laws of New York, 1934, Official Volume, p. 564) 2
Employer's Liability Law of South Dakota 46
Fourteenth Amendment, Sec. 1, Constitution of United States 2, 3, 10, 36, 44, 45, 48
Section 259-q of Art. 21-A (Laws of New York, 1934, Official Volume, p. 580) 2, 9, 59
Section 258-c, New York State Milk Control Law 19, 20
Sec. 1, Art. 1, Const. Wisc. 44, 45

TEXT BOOKS CITED.

6 R. C. L. pages 377, 386 ..... 42, 43

Supreme Court of the United States

OCTOBER TERM, 1935.

MAYFLOWER FARMS, INC., *Appellant,* against CHARLES H. BALDWIN, Commissioner of the Department of Agriculture and Markets of the State of New York, and KENNETH F. FEE, Director of the Division of Milk Control and Department of Agriculture and Markets of the State of New York, *Appellees.*	*No. 349.*

On Appeal from the Supreme Court of the State of New York.

BRIEF FOR APPELLANT.

Opinions Below.

The dissenting memorandum of the Appellate Division, Third Department, of the State of New York, is reported at 242 App. Div. 881.

The prevailing and dissenting opinions of the Court of Appeals of the State of New York are reported at 267 N. Y. 9.

Statute and Constitutional Question Involved.

The statute of the State, containing the four words which are challenged as unconstitutional in this case, is familiarly known as the New York State Milk Control Law. It is embodied in articles 21 and 21-A of the Agriculture and Markets Law of the State of New York, as added by Chapter 126 of the Laws of 1934 (Laws of New York, 1934, Official Volume, p. 564).

The only part of the statute involved herein which is challenged as unconstitutional is the time limitation created by the words "since April tenth, nineteen hundred thirty-three" which are found in the following quoted last sentence of Section 258-q of article 21-A of the Agriculture and Markets Law of the State of New York (Laws of New York, 1934, Official Volume, p. 580):

> "It shall not be unlawful for any milk dealer who *since April tenth, nineteen hundred thirty-three* has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

The constitutional question in this case is:

Do the words "since April tenth nineteen hundred thirty-three" in the unadvertised differential provision

quoted above, which prevent the Appellant from exercising the privilege thereby conferred, deny to the Appellant due process and the equal protection of the laws contrary to the fourteenth amendment to the Constitution of the United States?

Statement of Case.

This is an appeal from an order and judgment of the Supreme Court, Albany County, of the State of New York, entered upon the remittitur and decision of the Court of Appeals of the State of New York, handed down April 16, 1935. Probable jurisdiction was found by this Court on October 14, 1935.

The said order and judgment affirmed the order of the Appellate Division, Third Department, which confirmed the determination made by the Appellees on July 9, 1934, which denied the Appellant's application for a milk dealer's license.

In the Appellate Division, the three Justices who voted to confirm the action of the Appellees wrote no opinion and made no statement in justification of their decision. Of the two Justices who dissented, Mr. Presiding Justice James P. Hill wrote a short, but sharp, dissenting memorandum (R., p. 48). In the Court of Appeals of the State of New York there was again a division of opinion. Both the prevailing and dissenting opinions have been made a part of the record herein, pursuant to rule of this Court (R., pp. 49-60). A motion for re-argument was made by the Appellant and was denied without opinion on May 28, 1935.

Mayflower Farms, Inc., the Appellant herein, is a corporation organized under the laws of the State of New York in the month of May, 1933 (R., p. 22). On September 6, 1933, it received a milk dealer's license, pursuant to the 1933 Milk Control Law (R., p. 28). That license was revoked by a revocation order dated November 22, 1933, effective December 1, 1933 (R., pp. 28-29). The Appellant secured an Order of Certiorari, which stayed the said revocation order (R., p. 29). The said Certiorari Order was dismissed by the Appellate Division for the failure of the Appellant's then attorney to print the case and brief. The reason for the said revocation order was based upon the same ground as that upon which the Appellees based their denial of the Appellant's present application and hence will not be considered separately as an issue in this case (R., pp. 45, 33).

On or about April 28, 1934, the Appellant made an application for a milk dealer's license under the 1934 Milk Control Law (R., p. 11). The license fee of twenty-five dollars ($25.00) accompanied the application and was and still is retained by the Appellees (R., p. 17). On or about June 18, 1934, a hearing upon said application was held, at which Appellant's president, Mrs. Bertha Silberman, appeared and was examined under oath (R., p. 21, *et seq.)*. Upon said examination the following principal and undisputed facts were adduced:

1. That Appellant does a small volume of business, having only one route (R., p. 26), containing approximately 50 store customers (R., p. 27), to whom it sells and delivers milk at wholesale (Exhibit No. 3, R., p. 20).

2. Mrs. Silberman's husband, Maxwell Silberman, handles Appellant's one route, being the driver and the collector (R., p. 26); he was born and brought up in the milk business all his life (R., p. 30).

3. Appellant purchases its milk from the Supreme Milk & Cream Co., a New Jersey corporation, located at Perth Amboy, N. J. (R., p. 12) under Supreme's trade name "Puritan" (R., p. 35).

4. All of the milk it purchases is Grade "B" milk (R., p. 27).

5. It is an unadvertised brand of milk or, in other words, *milk that does not have a well advertised trade name* (R., p. 35).

6. At least five other independent milk wholesalers, like the Appellant, buy the same identical milk from the Supreme Milk and Cream Co. and sell it to stores as an unadvertised brand of milk (R., p. 35).

7. In the districts and on the same streets where the Appellant's customers' stores are located, there are other stores buying the same kind of milk appellant sells, from Appellant's competitors (R., p. 38).

8. Appellant is losing customers because its competitors get a lower price for the same kind of milk Appellant sells (R., p. 40).

On or about July 9th, 1934, the Appellees made the order under review herein denying the application of Appellant (R., p. 46), based upon the recommendation

of Mr. Harnach, who presided at the hearing (R., p. 22). The reason given was that the Appellant had violated a price-fixing order in that it sold its milk at the unadvertised price, which was one cent per quart below the price fixed by the Appellees for the sale of milk having a well advertised trade name and the Appellant, not having been in business on April 10, 1933, was not entitled to utilize the one cent unadvertised price differential provided for in section 258-q of the agriculture and markets law, effective April 1st, 1934 (R., p. 45). The Appellant is continuing to do business as a wholesale milk dealer in the city of New York, pursuant to the order of Hon. Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York (R., p. 66).

Assignment of Errors.

The Assignment of Errors will be found at pages 64 and 65 of the Record. All six assignments are strongly urged by appellant.

Summary of Argument.

I. The time limitation created by the words "since April tenth, Nineteen Hundred Thirty-three" in the unadvertised differential provision, which prevents the Appellant from enjoying and exercising the privilege thereby conferred is, UPON ITS FACE, arbitrary, discriminatory, irrational and unconstitutional and denies to the Appellant due process and the equal protection of the laws guaranteed by the fourteenth amendment.

II. The Appellant falls naturally into the natural class of unadvertised milk dealers in the City

of New York for whose benefit the price differential provision was enacted and, as a member of such class, is entitled to exercise the one cent per quart underselling privilege granted by such provision.

III. The time limitation is separable and may be excised from the unadvertised differential provision without doing violence to the intention of the legislature and without hampering or impairing the effectiveness of the provision or the Milk Control Law. On the contrary, its deletion will carry out the purpose of the provision and of the entire law.

ARGUMENT.

POINT I.

The time limitation created by the words "since April tenth, nineteen hundred thirty-three" in the unadvertised differential provision, which prevents the Appellant from enjoying and exercising the privilege thereby conferred, is, UPON ITS FACE, arbitrary, discriminatory, irrational and unconstitutional and denies to the Appellant due process and the equal protection of the laws guaranteed by the fourteenth amendment.

A. QUESTIONS NOT INVOLVED.

At the outset the appellant wishes to state what questions are not involved in the case at bar.

The Appellant concedes that the validity of the milk control law of the State of New York, in its broad aspects, is no longer open to question in view of this court's decision in Nebbia v. New York, 291 U. S. 502. The power of the State of New York to fix *uniform prices* at which milk shall be bought and sold within

the state, according to its grade and utilization and the character of the seller, was there squarely and unconditionally upheld. In the case at bar, a provision is under fire which, quite obviously and, upon its face, results in the fixing of *different prices* for the *same grade* of milk sold by the *same character* of milk seller.

The appellant likewise concedes the validity of the main classification provided for in the unadvertised differential provision, which divides milk dealers in the City of New York into two groups—those who sell milk having a well advertised trade name and those who sell unadvertised brands. It could not do otherwise because, being in the class of unadvertised milk dealers, it would not be entitled to assert and complain of the unconstitutionality of the provision with respect to the class of well-advertised milk dealers against whom the provision operates. Southern Rwy. Co. v. King, 217 U. S., 524, 534; Arkadelphia Co. v. St. Louis S. W. R'y Co., 249 U. S., 134, 149. Moreover, after much testimony was taken by a special master, pursuant to the direction of this Court in Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, the classification of milk dealers in the City of New York on the basis of the well advertised trade name factor, has been held to be constitutional (11 F. Supp. 599). Unless and until that decision is reversed by this Court, the constitutionality of that classification is not subject to question.

The appellant is affected adversely only by that part of the unadvertised differential provision which prevents it from exercising the one cent per quart underselling privilege conferred by that provision upon dealers selling unadvertised brands of milk in cities hav-

ing a population of one million or more, namely, the words: "since April tenth, nineteen hundred thirty-three."

For the purposes of this case, therefore, the last sentence of §258-q of the Agriculture and Markets Law, familiarly known as the unadvertised differential provision, should be considered as a little law standing by itself and not physically incorporated in the milk control law of the State of New York, the validity of which is not questioned and with the purposes of which the appellant is in full sympathy.

For convenience of reference throughout the argument, the said last sentence of §258-q will be referred to as the "unadvertised differential provision" or the "differential provision" and the words "since April tenth, nineteen hundred thirty-three", in said provision, will be referred to as the "time limitation".

B. THE CASE AGAINST THE TIME LIMITATION.

Under this head, the appellant will not only establish affirmatively that the time limitation is unconstitutional, but will also answer irrefutably the arguments advanced in support of its validity by the Appellees and by the Court of Appeals of the State of New York in its prevailing opinion.

The Court of Appeals clearly erred in assuming that the validity of the time limitation must be determined in the light of the purposes underlying the milk control law as a whole and that the time limitation bore some relation to that law. It incorrectly took the position

that the Legislature must have felt that, in inserting the time limitation in the differential provision, it might tend to accomplish one or more of the objects of the milk control law—vouchsafing the farmer a higher price for his product or stabilizing the industry as a whole. It overlooked the fact that those objects were accomplished completely, or as completely as it was within the Legislature's power to do so, when it provided that (1) every dealer should pay the farmer a fixed price for his milk, (2) every dealer should charge a fixed resale price to the storekeeper, and (3) every storekeeper should charge a fixed resale price to the consumer.

We shall see that the time limitation bears no relationship whatsoever to any of the purposes of the milk control law as it affected the farmers and the consumers, the two great classes in the light of whose interests the validity of any such law passed in the exercise of the police power must be determined.

The validity of the time limitation must be determined only in the light of the purpose underlying the differential provision in which it is contained *and by the principles and decisions of this court governing permissible classification under the equal protection clause of the Fourteenth Amendment.* That purpose, as we shall see, was the protection of the unadvertised dealers against the well advertised dealers under a system of uniform resale prices. Borden's Farm Products Co. v. Baldwin, 293 U. S. 194. It was accomplished by giving to the unadvertised dealer a one cent per quart underselling privilege. The new unadvertised dealer needs that privilege just as much, if not more, than the one who was in business on April 10, 1933.

Construed in the light of the reason for and the legitimate purpose of the differential provision, the police power, the emergency power and no other power on earth or under the sun can give any validity to the arbitrary and discriminatory time limitation.

1. Its Origin.

Having been inserted in and enacted as a part of the unadvertised differential provision, the time limitation has no history separate from that of the provision in which it is contained. The provision in its entirety was attacked as unconstitutional by the Borden's Farm Products Company in Borden's Farm Products Co. v. Baldwin, 7 Fed. Supp. 352, and subsequently in this Court in the same case, 293 U. S. 194. The opinions in that case traced the history of that provision in great detail and we think it unnecessary to restate here what was said there. More will be said about the reasons which led to its enactment under the third point of this head.

In the Borden case, *supra*, the independent, unadvertised milk dealers in business on April 10, 1933, for whose exclusive benefit the provision was enacted asked for and received leave from this Court to intervene and file a brief. In that brief, excerpts from speeches made by milk dealers from the City of New York, attending a joint hearing held upon the proposed milk control bill on March 23, 1934, were appended. In all of these excerpts, the legislature was exhorted to enact the differential provision so that the dealers selling unadvertised brands of milk would be able to compete with the dealers selling advertised brands

of milk. None of the speakers offered any reason why the underselling privilege granted by the provision should be limited to those unadvertised milk dealers engaged in business on April 10, 1933.

It is interesting to note that in the case at bar, no permission to intervene is sought by the unadvertised dealers benefited by the provision. The inevitable conclusion is that they could not show this Court any reason why they should have been singled out by the legislature as a select group and armed with such a powerful weapon as the under-selling privilege is.

2. It Has No Relation to the Purposes of the Milk Control Law.

The broad general purpose of the milk control law was to protect the farmer and milk producer by giving them a fair return for their product and to preserve the dairy industry from destruction and ruin attributed to unfair competition and price-cutting of milk dealers by fixing a *uniform* fair price at which milk should be sold.

With these major purposes in view, we analyze the time limitation. The price which the farmer and milk producer receive for their milk is fixed by price-fixing orders. It does not vary with the character of the milk dealer purchasing the milk. The price is the same whether it is sold to an advertised dealer or to an unadvertised dealer engaged in business either before or after April 10, 1933, and regardless of the number of dealers in the field.

Looking at the law from the consumer's viewpoint, the time limitation not only does not benefit but is actually a detriment to him. The price he pays for milk is fixed by price-fixing orders. If he buys milk from a storekeeper who is supplied by an unadvertised dealer engaged in business on April 10, 1933, he gets the benefit of a lower price of 1¢ per quart. But if he should be foolish enough to go to a storekeeper supplied by an unadvertised dealer who engaged in business after April 10, 1933, the same, identical milk will cost him 1¢ per quart more—the same price for which he could procure one of the well-advertised brands of milk.

The fixing of a *uniform* price for dealers effectually prevents the unfair competition and the destructive price-cutting activities that threatened the destruction and demoralization of the industry. The root of all evils in the milk business was thus destroyed by the stabilization of price throughout the industry.

3. It Has No Relation to the True and Lawful Purpose of the Unadvertised Differential Provision.

As foreign as the time limitation is to any purpose of the milk control law, it is still more so with respect to the unadvertised differential provision in which it is contained. If the words "since April tenth, nineteen hundred thirty-three" had been omitted from the provision, as they should have been, the purpose of the provision—to enable the unadvertised dealers to meet the competition of the well advertised dealers who, it was feared, would monopolize the business under a system of uniform resale prices—would have been fully and lawfully carried out. There was no reason

for its inclusion other than the selfish desire on the part of the independent dealers in business on that date not only to be protected against the well advertised dealers but to shut the door to new unadvertised dealers. Of that desire more will be said under Point 4. The same reason exists for giving the under-selling privilege to unadvertised dealers entering business after April 10, 1933, as for those in business prior to that date—they must, equally with existing dealers, be protected against the well-advertised dealers.

4. Its Real Purpose is to Create a Monopoly.

The ground chiefly urged in support of the validity of the entire differential provision in the Borden case, *supra*, was that it was intended, not without reason, to be a safeguard against monopoly. Quite evidently that argument induced the legislature to enact that provision. Strangely enough, it made very little impression upon this court if the language used by this court in its opinion at pages 205 and 206 is analyzed and studied. But the time limitation here in question which was not even mentioned by this court in that opinion is clearly designed to create a quasi-monopoly, if not an absolute monopoly in favor of the unadvertised dealers, at whose insistence the provision was enacted —not monopoly in the technical sense, but in the sense that the business would tend to become concentrated in the hands of a small group of unadvertised dealers —those in the field on April 10, 1933. It is undisputed that the differential provision was not requested or suggested by the only fact-finding agency set up by the legislature to study the problems of the milk emergency. Thus in Borden's Farm Products Co. v. Bald-

win, *supra*, p. 205, this court, speaking of the differential provision, said:

> "The legislative committee did not, however, recommend the fixing of the differential here in question, and hence did not state grounds in support of such a discrimination."

And, in a footnote on that same page:

> "It appears that in the case of both the acts of 1933 and 1934, the provision in question was added in the course of legislative consideration of proposed measures and at the instance of dealers described as independents, 7 F. Supp. p. 353."

The time limitation, bearing, as we have seen, no relationship to the true and lawful purpose assigned by the unadvertised dealers who pleaded with the legislature for the benefit of the differential, namely,—protection against the well-advertised dealers—can only be explained as follows: When the unadvertised dealers perceived that they had succeeded in convincing the legislature that the enactment of the 1¢ differential was absolutely necessary for their continuance in business, the fundamental and normal instinct of self-preservation which motivated them in demanding the inclusion of the provision, degenerated, at the same time, into the base instincts of selfishness and destruction. Having been assured a finger, they wanted the whole hand. They were not satisfied with the protection the differential would give them against the well advertised dealer. They were not content with preserving the *status quo* as to prices, which they claimed, existed between them and the well advertised dealers at the time and just prior to the time the first milk control law became effective. They saw an opportunity to

burn the bridges behind them so they decided to prevent any dealers from thereafter coming into their own class and obtaining the benefit of the differential, although such dealers might in every conceivable respect be in the same class. In effect and in fact they purposed to render it impossible for others to come into their business in competition with them. It was their intention and desire to become, after April 10, 1933, an exclusive fraternity, to which no other milk dealer could become eligible for membership. Stated differently, on the one hand, they sought to prevent the well advertised dealers from enjoying a monopoly and, on the other hand, they became crazed with the desire for just such a monopoly for themselves as against new dealers entering the field. On the one side, they proclaimed their wish for the preservation of competitive opportunities alleged to have existed before the statute and, on the other, they desired to abolish and wipe out new competition—a factor always present before the enactment of the milk control laws, namely—the normal and natural emergence of new dealers into the field.

Apparently they did not dare to ask the legislature expressly and directly to prohibit new dealers from engaging in business so that their monopolistic desires might be realized. So they sought to accomplish by indirection what they could not obtain directly. They artfully devised the time limitation and inserted it in the privilege provision for the purpose of effectuating their insidious and invidious intentions.

It is interesting to note in this connection that some of those unadvertised dealers were bolder than others.

For example, one E. F. Cook is quoted, in an excerpt set forth at page 31 of the brief of the independent dealers in the Borden case, *supra*, and taken from page 106 of the original minutes of the Joint Legislative Hearing of 1934 on the Pitcher milk control bill, as having asked for the insertion of a 1¢ differential provision which would be limited to those dealers who had been engaged in the milk business for *five years* preceding the effective date of the bill.

What human right, what moral or legal power these independent dealers invoked to frustrate man's inalienable right to enter and engage, on a basis of equality, in an innocent and lawful occupation, no one knows. By what divine right or legal justification they felt themselves entitled to such protection as would create for themselves a virtual monopoly, no one has been able to discover.

The time limitation was a phrase surreptitiously sandwiched into the differential provision. It was merely something which the independent dealers then in business put over on the legislature. It formed no natural part of the differential provision and was absolutely unnecessary to carry out any legitimate purpose of either the entire law or of the differential provision alone. (See points 2 and 3.) It was inserted in the provision for the sole purpose and had the effect of either absolutely prohibiting the entrance of any new unadvertised dealers or of putting any new unadvertised dealer, courageous enough to apply for admission, into the class of well advertised dealers where his death would surely ensue.

5. Its Effect is to Prohibit New Dealers from Entering the Field.

The effect of the time limitation is the same as if the law provided that no new milk dealers shall be licensed. As stated in the dissenting opinion in the court below (R., p. 57),

> "When we approach the case at bar from the standpoint of an individual who desires to enter the milk business, we find that the door is effectively closed to him. Denying the individual the price differential is as effective as a direct prohibition. Mr. Justice Cardozo in discussing the same milk control law in Hegeman Farms Corporation v. Baldwin, 293 U. S. 163, 169, said: 'What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant [an unadvertised dealer] is able to charge.' (Words in brackets inserted.)"

To like effect was the dissenting memorandum of Mr. Presiding Justice Hill of the Appellate Division (R., p. 48).

Even the Court of Appeals, in its prevailing opinion, admitted that prohibition was the effect of the time limitation. 267 N. Y. at p. 15 (R., p. 55).

The appellant submits that the Court of Appeals, recognizing, as it did, that prohibition was the effect of the time limitation, erred in failing to condemn it as unconstitutional upon that ground alone.

The milk business, unlike the liquor traffic, gaming and other businesses *malum in se*, is a lawful, common and ordinary calling which may be regulated but not

prohibited by the legislature. People v. Beakes Dairy Co., 222 N. Y. 417, 427; People *ex rel.* Tyroler v. Warden, etc., 157 N. Y. 116; Fisher Co. v. Woods, 187 N. Y. 90; Adams v. Tanner, 244 U. S. 590.

In Weaver v. Palmer Bros., 270 U. S. 402, 415, this court said:

> "The constitutional guaranties may not be made to yield to convenience. Schlesinger v. Wisconsin, 270 U. S. p. 230. The business here involved is legitimate and useful; and while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment." Adams v. Tanner, 244 U. S. 590, 596; Meyer v. Nebraska, 262 U. S. 390; Burns Baking Co. v. Bryan, 264 U. S. 504.

6. It Cannot Be Supported by the Argument that It Was Intended to Prevent New and Injurious Competition; Such Competition was and is Directly and Effectively Prevented by § 258-c Which the Court Below Completely Overlooked.

The meat of the decision of the court below lies in its belief, expressed at page 55 of the record, that the Legislature might have felt that new competition in the milk business might prove injurious to the result that it intended to accomplish by the Milk control law and that, consequently, it must have intentionally designed the time limitation for the purpose of preventing new dealers from coming into the field.

The appellant points out that the court, in advancing that argument in support of the time limitation, completely overlooked the first sentence of §258-c of the milk control law, which reads as follows:

"§258-c. Granting and revoking licenses. No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, *that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest.* * * *" (Italics ours.)

If the Legislature feared the result of and desired to prohibit new, unnecessary and injurious competition, as the court said it must have, the appellant submits that the section above quoted directly, expressly, effectively and completely prevents such competition and was the vehicle directly and explicitly fashioned and exclusively relied upon by the Legislature to accomplish that purpose.

Of course, the provisions of section 258-c and their validity are not at all involved in the case at bar. The section is merely referred to by appellant to show the fallacy underlying the reasoning of the court below. A mere comparison shows that the time limitation has the effect of absolutely and unconstitutionally prohibiting new dealers (see point 5) whereas §258-c merely regulates the licensing of but does not prohibit new dealers.

7. It Cannot Be Supported by the Argument that the Provision Containing It Was Enacted to Preserve the Status Quo of the Milk Dealers in Business on April 10, 1933.

It is logical to assume that the unadvertised dealers needed the 1¢ per quart differential to compete with the well advertised dealers. But why was it necessary to limit the underselling privilege to those unadvertised dealers in business on April 10, 1933? Was it because the unadvertised dealers enjoyed freedom from competition of new unadvertised dealers prior to the enactment of the milk control law? Of course not. The normal and natural emergence of new dealers had always been a factor which milk dealers had to contend with (dissenting opinion, R., p. 58). The time limitation cannot be justified on the ground that the differential provision containing it preserves the *status quo* of the milk dealers in business on April 10, 1933, because by preventing new dealers from entering the business, the time limitation destroys rather than continues competitive opportunities as they formerly existed. *In effect, the legislature said to the unadvertised dealers of April 10, 1933: "You are our chosen people. We selected you as a group to engage in the milk business without fear of new competition. We will allow you to undersell the advertised dealers so you need not fear them. At the same time we will give you more than you need—more than you are entitled to. We will not permit any new dealers to have the underselling privilege. That will effectively prevent new dealers from entering the field."*

8. It Cannot Be Supported by the Argument That the Well Advertised Dealers Would Form Unadvertised Subsidiaries.

The court below attempted to justify the time limitation in the following language, (R., p. 56):

> "The act not only had the effect of limiting to those engaged in the unadvertised milk business, at the date of the first act the privilege of the differential, but it also prevented the large holding companies, known as advertised dealers, from dissolving those companies and permitting the subsidiary corporations thereof from engaging in the sale of milk in competition with the unadvertised dealers and enjoying the privilege of selling at one cent per quart less than the uniform price. It might reasonably anticipate such action on the part of the large holding companies. It might also reasonably foresee that such action would result in driving unadvertised dealers from the field, with great financial loss to them and to thousands of farmers who were dependent upon them for a market for their milk, thus tending to defeat the very purpose which the differential clause was enacted to prevent."

The dissenting opinion simply and effectively answers this argument as follows, (R., p. 59):

> "Another reason given is that the advertised dealers might permit their subsidiaries to enter the field of the independent dealer. As the only justification for the differential against the advertised dealer is the potent sales appeal of the well-advertised name, no reason remains when the company sells the milk under another name. Thus does the monopoly given to the independent dealers stand without justification or reason."

The truth of the matter is that the advertised dealers always had had and now have subsidiary or af-

filiated companies doing business under unadvertised names. Under such names, they are entitled to sell at the unadvertised price. Without the benefit of the widely-heralded well-advertised trade name, they have no greater selling advantage than other unadvertised dealers, and constitute no threat to the latter. It is only when milk is sold under the name of Borden, Sheffield, Dairymen's League or Renken (the four dealers thus far placed on the well-advertised list) that it is sold as an advertised brand. Should any such subsidiaries, as well as any other unadvertised dealers, become sufficiently well known to the trade, they will likewise be placed upon the well-advertised list. Admitted then, that the advertised dealers would form subsidiaries to sell milk under unadvertised names, that is no reason why unadvertised dealers starting after April 10, 1933, like the appellant, qualified in every respect, should be denied the underselling privilege.

9. It Cannot Be Supported on Emergency Grounds.

The court below seemed to place great emphasis upon the fact that the milk control law fixes prices only during an emergency period and that, therefore, the legislature could lawfully deny the appellant the right to undersell the well-advertised dealers.

There is no magic or mystery in the word "emergency." It does not create any new rights in the State; it merely provides the scene for the exercise of powers which have always inhered in the State under its general police power. It furnishes the State with the occasion to invoke its police power and do some things

which in ordinary times and under ordinary circumstances it could not do. But those things and the statutes authorizing them, because of their drastic character, must, more so than ever, have a reasonable relation to the purpose sought to be accomplished; that is, they must have a natural, or at least reasonable, tendency to avert or remedy the consequences of the dangerous or unusual conditions which constitute the emergency. That the time limitation bears no relation at all to any legitimate purpose has already been shown. (See Points 2 and 3 under this head.)

If the differential provision had excepted from its operation and benefit all those dealers who had blond hair or blue eyes, or were unmarried, or those dealers under thirty-five years of age, or who had stores on 42d Street—could it be reasonably argued that any emergency, no matter how great or severe, would justify such discrimination?

Neither emergency nor police power is a valid excuse for arbitrary classification or selection of that character or of the character of the time limitation here in question. A classification based upon the time when an unadvertised dealer came into the business has no more relation to the purpose of the differential provision—to enable unadvertised dealers to compete with advertised dealers—than a classification based upon the color of the dealer's hair or eyes, whether he is single or married, has or has no children, has a place for business on a particular street or is of a certain age. (See examples of arbitrary classification under Point II.)

In either case it is plain that the exception is not in the public interest, but obviously only in the interest of the class benefited by the privilege conferred and it must therefore be condemned as unconstitutional. See People v. Ringe, 197 N. Y. 143, 149-51; Hauser v. N. B. & Merc. Ins. Co., 206 N. Y. 455, 461-5.

The fact that the milk price-fixing law is to be effective during a period of emergency specified in the act (the period has been twice extended for periods of one year each), does not give any validity to the time limitation. *The equal protection clause of the federal constitution does not permit of any evasion of its prohibitory terms for even a minute, much less for three years and perhaps longer.* (See *Ex parte* Milligan, 4 Wall. 2, 120; Boyd v. United States, 116 U. S. 616, 635; Block v. Hirsh, 256 U. S. 160, 165, 166, 168.)

A statute which clearly denies the equal protection of the laws guaranteed by the federal constitution cannot be upheld simply because that denial will be of temporary duration. The time limitation here in question denies the appellant the equal protection of the laws. Is it any satisfaction to this appellant to be told that at some future time the ban may be lifted and it may then engage in business on equal terms with its competitors?

The court below erred in supporting its decision in this case on emergency grounds because, as we have seen, the time limitation has absolutely no connection with and does not alleviate in any way the emergency created by the farmer's milk strikes and the dealers' price-cutting activities which gave rise to the enact-

ment of the milk control law; nor does it aid the public, the farmer or the milk producer; it merely grants an exclusive privilege to the unadvertised dealers in business on April 10, 1933 and a favor to the four advertised dealers by effectively preventing new competition.

10. It Cannot Be Supported as a Legitimate Exercise of Police Power.

Surely, the limitation of time, arbitrarily dividing a group of independent milk dealers selling unadvertised milk into those who were engaged in business prior to April 10, 1933, who are given the privilege of utilizing the price differential, and those who engaged in business subsequent thereto, who are deprived of that privilege, cannot be upheld as a valid exercise of the police power.

That power may justifiably be exercised only when it appears that the interests of the public generally, *as distinguished from those of a particular class,* require it, and when the means used are reasonably necessary for the accomplishment of the desired end, and are not unduly oppressive (Lawton v. Steele, 152 U. S. 133, 137; Colon v. Lisk, 153 N. Y. 188, 196; Wright v. Hart, 182 N. Y. 330).

In order to sustain legislation under the police power, the Courts must be able to see that its operation tends in some degree *to prevent some offense or evil,* or *to preserve public health, morals, safety and welfare.* If it discloses no such purpose, but is clearly calculated to invade the liberty and property of private citizens, it is plainly the duty of the Courts to declare it invalid, for legislative attempt to abridge or hamper

the right of a person to pursue, unmolested and without unreasonable regulation, any lawful calling or avocation which he may choose, has always been condemned under our form of government (Lochner v. New York, 198 U. S. 45).

There is nothing in that dividing phrase—since April 10, 1933,—which protects or promotes the public health, morals, safety or welfare. The provision in which it is found does not provide for one set of qualifications for milk dealers who were engaged in business prior to April 10, 1933 and another and more stringent set for those who began thereafter—all milk dealers must have the same qualifications under the law. Once given a license to sell milk, the new milk dealer should be treated in the same manner as the one already in business.

We have no doubt but that the Legislature could validly provide for stricter regulations as conditions precedent to obtaining a license by those wishing to come into the business after a certain date. (Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502; Watson v. Maryland, 218 U. S. 173; People v. Griswold, 213 N. Y. 92 and kindred cases.) Or regulations could be made based on any number of distinctions, for example—the grades of milk sold, the character of distribution, wholesale or retail, amount of milk sold in a week, month or other period, size of plant or business, etc., and classifications might be made based on such differences, but all in the same class would necessarily have to be treated alike without regard to when each dealer started in business.

However, to prescribe different qualifications for entrance into the business, or to prescribe regulations covering the different classes is entirely different from proscribing, in effect, the right to engage in such business altogether.

The appellant is an independent milk dealer selling an unadvertised brand of milk to other milk dealers (store owners). It is undisputed from the record that the identical brand of milk sold by appellant is sold by several other independent milk dealers (competitors of appellant) to stores located on the same streets as the stores of certain customers of appellant (R., p. 38). Why should the appellant have to charge one cent per quart more for its milk than its competitors charge? The appellant is in the same class with these competitors—why should it be subjected to such unfair discrimination?

The case of Connolly v. Union Sewer Pipe Company, 184 U. S. 540, discusses the police power of states and its relation to the equal protection clause of the federal constitution. We quote from that decision. First, at page 558, this court said:

> "The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat 1, 210; Sinnott v. Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Railway v. Haber, 169 U. S. 613, 626."

And at page 563, this court concluded as follows:

> "But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity * * * Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

The time limitation does exactly what the Connolly case forbids. It makes criminal the sale of milk at the unadvertised price by the appellant although the sale of milk at the same price by appellant's competitors—the same class of dealers—is lawful.

In the case of Truax v. Corrigan, 257 U. S. 312, at page 333, this court, speaking of the equal protection clause, said:

> "Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Tested by these decisions and those cited hereafter under this head, the time limitation stands revealed in

its true light. It does not protect the public morals, the public health or the public safety or welfare. It does not aid the farmer, the public or the consumer. It is intended to aid only the independent unadvertised dealers in business on April 10, 1933, by giving them a monopoly, or the four well advertised dealers, by preventing competition from unadvertised dealers entering business after April 10, 1933.

The dissenting opinion of the court below (R., pp. 58, 59) clearly shows up the time limitation for what it really is:

> "The record shows that the identical brand of milk sold by appellant is sold by several other independent milk dealers, competitors of appellants, to the same class of retailers in the same stores and on the same streets. Why should the appellant have to charge one cent more per quart for his milk than his competitors charge? The appellant is in the same class with these competitors. Why the unfair discrimination? Without any apparent justification it discriminates between one entering the milk business prior to April 10, 1933, and a dealer entering on the next day. One looks in vain to find a reason for this discrimination. The only reason given is that the Legislature did not wish to increase or intensify the competition against the advertised dealers by permitting new dealers to join the class of the unadvertised dealers. In other words, a monopoly was given to the unadvertised dealers so as not to increase the competition against the advertised dealers. *Is it not apparent that this reason is in fact no reason at all and is only given in an attempt to justify an unjustifiable discrimination?*" (Italics ours.)

The mere fact that the time limitation is included within a provision which forms a part of a statute (the

milk control law) concededly enacted in the exercise of and justified by the police and emergency powers of the state does not lend any strength to its validity. In Coppage v. Kansas, 236 U. S. 1, this court said:

> "Now it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of the power. 'Its true character cannot be changed by its collocation.'"

Collocation seems to be quite an important element in the case at bar for, apparently, the court below misinterpreted the true nature of the time limitation simply because of its physical presence in the milk control law.

11. It is Not Based on any Factual Situation.

Time and time again the court below referred to the existence of a factual situation as supporting the right of the legislature to insert the time limitation in the differential provision.

The court below was clearly wrong. There was no factual situation before the legislature with respect to the differential provision or the time limitation within it. At least this court, in Borden's Farm Products v. Baldwin, *supra*, couldn't find any. If it had, it would not have found it necessary to remand that case to the district court for the taking of testimony relative to trade conditions existing in the city of New York just prior to the enactment of the milk control law. And

certainly, if there was no factual situation before the legislature regarding the differential provision, there could not have been any regarding the time limitation because that was merely a portion of that provision.

The court below was confused by the factual situation which gave rise to the enactment of the milk control law as a whole—the facts which the joint legislative committee headed by Senator Pitcher in 1932 gathered and presented to the legislature. Nothing was said by that committee either with respect to the differential provision or the time limitation (Borden's Farm Products Co. v. Baldwin, *supra.)* There were no facts before the Legislature which could have justified depriving the appellant of the right to engage as an unadvertised dealer on the same basis as the unadvertised dealers of April 10, 1933. There could not have been any and there were no facts which would show how many new dealers would normally have entered the field from April 10, 1933, until the end of the successively-extended emergency period or what effect their competition would have upon the farmer or the consumer or even the existing dealers.

The court below must have felt that this court, in the Nebbia case, *supra,* had held that the state could fix prices for milk that were not uniform. Judge O'Brien of the court below concurred in the result solely on the authority of that decision. Appellant respectfully submits that this court by its general language in that decision, did not intend to sanction price-fixing of milk by the legislature that would violate the equal protection clause.

12. It is an Unusual Legislative Expedient and Its Approval Will Establish a Most Dangerous Precedent.

The use by the Legislature of the State of New York of the time limitation in the differential provision is a most unusual expedient. The intervention of government in the ordinary forms of business such as the milk business, in the form of fixing prices, although approved by this court, is itself in the nature of an untried experiment. Here, however, we have a provision which allows a lower minimum price for the same grade of milk sold by the same kind of dealer. The exclusive privilege of underselling was given to the unadvertised dealers who happened to be in business on April 10, 1933. The appellant was organized in May, 1933, and received a license in September, 1933. It was qualified in every respect. Its application for a license under the present law was denied because it claimed the benefit of the underselling privilege. If the provision which denies the appellant that privilege is approved by this court, a most dangerous precedent will have been established.

For example, let us assume that the legislature, for some reason or other, so far intervened in the private pursuits and trades practiced by dentists, lawyers, architects, barbers, *et cetera* as to fix the prices charged by such professional and tradesmen. With the time limitation approved by this court as a precedent, the Legislature could lawfully provide that new dentists, architects or barbers coming into their respective fields after April 10, 1933, or some other arbitrary date must get a specified price, either more or less, than that received by those already practicing or in business, for

whom a standard price is also set up. In other words, the barber going into business on April 11, 1933 and thereafter must charge at least 30¢ for a shave and 60¢ for a haircut, whereas those previously in business may charge 25¢ and 50¢ respectively for those services. Or by such a statute, a new dentist must charge $5.00 for pulling a tooth and the one already established could charge $4.00 therefor. Or that by such a statute, the neophyte at the bar could be compelled to charge at least $10.00 for drawing a deed or mortgage and an attorney admitted to the bar on or before the date specified would be required to charge only $8.00 for the same service.

Such an assumption is not as ridiculous as it appears on its face. The possibility of such legislation is not at all fantastic in view of the great inroads the national and state governments are making in the internal management and conduct of what have heretofore been considered private businesses.

Moreover, this court's approval of the time limitation would effect a radical departure from the principles laid down by this court in the numerous decisions governing arbitrary class legislation. A very important constitutional question is here presented. An answer unfavorable to the appellant will have far-reaching and dangerous consequences. To hold that the New York state legislature could lawfully discriminate between old and new dealers *in the conduct* of an innocent and lawful business, such as the milk business, whether forever or for a day, would be unprecedented in Anglo-American jurisprudence.

To concede the validity of the time limitation would be to concede the power of the legislature in the guise of a regulation to destroy a lawful business—a power which this court has declared in many cases does not exist. Burns Baking Co. v. Bryan, 264 U. S. 504, 513. See also Meyer v. Nebraska, 262 U. S. 390, 399-400; Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74; Pierce v. Society of Sisters, 268 U. S. 510, 534-535; Weaver v. Palmer Bros., 270 U. S. 402, 412-15; Fairmont Co. v. Minnesota, 274 U. S. 1, 9-11; Liggett Co. v. Baldridge, 278 U. S. 105, 113.

On the other hand, the effect of a decision of this court giving this appellant a license which it deserves and has qualified for, will not disrupt but promote the working of the milk control system of the state of New York. Such a decision will be entirely harmonious with the purposes underlying the milk control law. It will aid the many independent farmers who sell to the independent, unadvertised dealers, by assuring them an additional distribution outlet. They will get the same price from the appellant as they do from the longer established dealers. The consumer will be benefited because he will be able to buy from storekeepers supplied with unadvertised milk by appellant without being made to pay the well-advertised price. The appellant and perhaps a few other dealers similarly situated will be brought under the protective arm of the differential provision as they should have been originally and the state of New York will not thereafter be guilty of grossly violating the prohibition contained in the due process and equal protection clauses of the federal constitution.

The purpose of the fourteenth amendment is to prevent legislatures from making discriminations without any basis; in other words, to do away with arbitrary and unreasonable class legislation. "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. 'Arbitrary selection, it has been said, cannot be justified by calling it classification.'" Southern Ry. Co. vs. Greene, 216 U. S. 400, 417; Gulf Col. & S. F. Ry. vs. Ellis, 165 U. S. 150; Lindsley vs. Natural Car. Gas Co., 220 U. S. 61; St. John vs. New York, 201 U. S. 633; Miss. Pa. Ry. Co. vs. Mackey, 127 U. S. 205; Minn. & St. Louis Ry. Co. vs. Herrick, 127 U. S. 210; Chicago K. & W. R. R. Co. vs. Pontius, 157 U. S. 209; Pacific Ry. Co. vs. Humes, 115 U. S. 572; Barbier vs. Connolly, 113 U. S. 27; Soon Hing vs. Crowley, 113 U. S. 703; Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, 294; Connolly vs. U. S. P. Co., 184 U. S. 540; Power Manufacturing Co. vs. Saunders, 274 U. S. 490, 493.

The controlling test in construing class legislation is that all in the same class or similarly situated must be equally dealt with. People vs. Reardon, 184 N. Y. 431; People vs. Mensching, 187 N. Y. 8; People *ex rel.* Williams, etc. vs. Metz, 193 N. Y. 148, 164, 5; Musco vs. United Surety Co., 196 N. Y. 459; People vs. O. C. R. C. Co., 175 N. Y. 84.

In New State Ice Co. v. Liebman, 285 U. S. 262 at pages 279-280, the following language appears which might be addressed with the same force and effect to the discriminatory time limitation attacked in the case at bar:

> "There is no question now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in the occupation can make and sell all the shoes that are needed.
>
> * * * * * * * * *
>
> And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases." (Citing many cases.)

Even in the fine dissenting opinion of Mr. Justice Brandeis in which Mr. Justice Stone concurred, at page

285, the dissenting judges recognized the inability of the state to enact discriminatory legislation, by saying: "The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable."

In Yick Wo v. Hopkins, 118 U. S. 356, at page 358, an ordinance purporting to regulate the conduct of the laundry business was condemned in the following language:

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation, which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.
>
> The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes to which all similarly situated may conform. It allows without restriction the use for such purpose of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure."

Just as there was an arbitrary line in the Yick Wo v. Hopkins case, *supra,* so, in the case at bar, the time limitation forms the arbitrary line, on the one side of which are the unadvertised dealers who are given the one cent per quart underselling privilege and on the

other side of which are the few unadvertised dealers, like the appellant, who need the same privilege, but are denied it because they started in business after April 10, 1933.

A statute may show on its face that the classification made by it is arbitrary (*The Borden case*, 293 U. S. 194, 210). *If so, without other evidence or competent proof, it must appear, "upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right"* (*Id.* p. 204). It cannot possibly be said here as it was said in Nebbia vs. People, 291 U. S. at p. 521 that the time limitation "is not on its face arbitrary or unreasonable, for there are obvious distinctions between the two sorts of merchants which may well justify a difference of treatment." In the instant case there is neither an obvious nor a latent distinction between the two groups of merchants or dealers created by the time limitation. There can be no presumption of the existence of a state of facts justifying such legislative classification, as is here in question, where no state of facts reasonably can be conceived to sustain it. *The time limitation is, therefore, arbitrary on its face, and the appellees must show that it has some rational basis consistent with constitutional right as well as a reasonable relation to a proper legislative purpose.*

The Borden Case, *supra*, pp. 204, 210.
Smith vs. Cahoon, 283 U. S. 553.

This the appellees have failed to do. Throughout the history of this case, they made no answer to appellant's arguments. Apparently, the court below also

ignored completely appellant's arguments addressed to the arbitrary classification made by the time limitation and disregarded the principles underlying permissible class legislation. Appellant has been placed in an unfair position, by being made to assume the burden of showing the invalidity of the arbitrary time limitation. Nevertheless, the appellant has assumed and sustained it; what more can it say than that facts do not exist and that the limitation bears no relation to the purpose of the differential provision to enable the unadvertised dealers to meet the competition of the well advertised dealers, or to the purpose of the entire law to aid the farmer and end price-cutting by establishing uniform prices. (See points 2 and 3.)

The appellees and the court below constantly referred to the existence of a factual situation, but not once have they alluded to a particular fact or facts showing specific details of time, place and condition. It is one thing to say generally that there are facts justifying a classification and an entirely different thing to show what those facts are. It is now high time that the appellees got down to the specific. We are sure that this court wants to know what those facts were as well as what they claim was the legitimate reason for the time limitation. We have a right to know as do other new unadvertised dealers. This court was insistent that it should be supplied with the facts in the Borden case. It is not only the right but the duty of this court to know the factual situation, if there be any, before deciding whether, in any particular case, man's inalienable rights, guaranteed by the Federal Constitution, have been invaded or denied.

We contend that there are absolutely no facts to justify the discrimination at bar. But if there are, by all means, let the appellees or anyone bring them out in the open, so that they may be examined and weighed by this august tribunal in the performance of its constitutional duties. Certainly, if your appellant knew any facts other than what has already been said in preceding points, regarding the purpose of and reason for the time limitation, it would lay them before this court, and attempt to show that they could not possibly justify the arbitrary classification. The truth of the matter is that not only are there no facts supporting the discrimination, but the dividing of one class of milk dealers in two by the mere interposition of a date, and the effectual prohibition of the dealers on this side of the date from going into or continuing in business is such a drastic oppression of man's natural right to engage in a lawful business and such a gross and flagrant abuse of constitutional rights, that it is difficult to even conceive or imagine a set of facts that would justify the time limitation, even in this day of experimental legislation and liberal judicial interpretation or construction.

It is reasonable to assume that if the appellees had the facts they would have pointed them out long before this. If by any stretch of the imagination the courts below could be said to have had judicial notice of any facts relating not to the milk control law generally, but specifically to the time limitation, certainly this court, as it has already stated in the Borden case, does not know them. In the final analysis, it is this court which must have the facts to enable it to pass upon the constitutionality of those four words which, in effect,

make advertised dealers out of new dealers before they even start in business.

The real facts, as presented in this point, show beyond a doubt that the only reason for the inclusion of the time limitation in the differential provision was because the unadvertised dealers then in business wanted it there for their additional protection. Can it be possible that these real facts have a reasonable relation to a proper legislative purpose? A group of milk dealers wish to concentrate all the business in their own hands, and prevent new dealers from coming in. This is the very thing which the differential provision sought to prevent. Where is the justification, legal or otherwise? What about the interests of the public or milk producer? What about the constitutional rights of your appellant? Are they to be entirely ignored?

POINT II.

The Appellant falls naturally into the natural class of unadvertised dealers in the City of New York for whose benefit the price differential provision was enacted and, as a member of such class, is entitled to exercise the one cent per quart underselling privilege granted by such provision.

The general principles governing classifications based upon time are clearly enunciated in 6 R. C. L. at pages 377, 386, as follows:

> "A proper classification must embrace all that naturally belong to the class, and it must not be based on existing circumstances only, or so constituted as to preclude additions to the number included within a class, but must be such as to embrace all those who may thereafter be in similar circumstances and conditions.

> The Classification must not be based on existing conditions only, but provision must be made for future acquisitions to the class as other subjects acquire the characteristics which form the basis of the classification. This principle is of considerable importance when attempts are made to draw distinctions based on time, putting in one class all the instances existing on a designated date, and placing all others in another class. Under certain circumstances, where such a procedure would discriminate unwarrantably in favor of establishments, things or persons existing, or engaged in particular occupations on a given date, the courts have held that the classification is in denial of the equal protection of the laws."

Counsel for appellant have combed the reports for decisions involving discriminatory legislation and numerous examples have been found. Under this point, only the cases involving facts most nearly resembling those involved in the case at bar will be collated and discussed. They all carry out the fundamental principle that whenever classifications are made by legislatures, all who are in the same class or similarly situated *or who may become similarly situated after the effective date of the act,* must be equally dealt with. While no case has been found "on all fours" with the case at bar, most of the cases found have condemned statutes that were not nearly such apparent examples of arbitrary class legislation and such flagrant violations of the fourteenth amendment as is the time limitation in the case at bar.

In Standard Oil Co. of N. J. v. City of Charlottesville, 42 Fed. (2nd) 88, an ordinance purporting to regulate the storage and sale of gasoline was under consideration and the court granted an injunction to

restrain its enforcement because of its repugnance to the 14th Amdt. At page 91, the court said:

> "As such a regulation, however, it is unreasonable in that its restrictions do not tend to the preservation of the public safety, and in that, by the exception of existing stations from its terms, it denies to the complainant the equal protection of the laws and, under the circumstances of the case, grants a virtual monopoly to the owners of existing stations."

And at page 93:

> "It cannot be said that an ordinance, the purpose of which is the safeguarding of the public in the handling of a dangerous commodity, makes a classification having a fair and substantial relation to its object, where it exempts from its operation established businesses and applies restrictions only to business to be established in the future; nor can such an ordinance be said to treat all persons similarly circumstanced alike. The fact that one is already engaged in a dangerous business manifestly does not put him in a class which can be favored by the state in legislation regulating such business."

In State v. Whitcom, 122 Wisc. 110, the court condemned as unconstitutional under the 14th Amdt. a statute relating to the licensing and punishing of peddlers and transient merchants. While the statute provided that no person shall peddle without obtaining a license, it gave many classes of persons exemption, among them, the nurseryman or farmer who shall have actually raised the products sold, "or shall have owned and been in possession of the same for not less than three months next prior to the sale." At page 118, the court said:

> "*On the police power and the taxing power alike rests the limitation that its exercise shall affect all persons equally.* (Italics ours.) Sec. 1, Art. 1

Const. Wisc.; sec. 1, Amendment XIV, Const. U. S.; State *ex rel.* Kellogg v. Currens, 111 Wis. 431, 434. The uniformity and the equality thus enjoined are construed only with such meaning as to enable practical government. Such command does not require that all property or all persons shall be treated exactly alike, but permits separation of either into classes of property or of persons similarly conditioned or situated, having characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general and public purpose and object of the particular situation." (Citing cases.)

And again, at page 120:

"Again, what possible reason, revenue or police, can justify discrimination between the farmer or mechanic whose goods were purchased three months earlier and one who would offer to the community newly purchased goods of the same kind? Is one more honest than the other? If so, which? Is one more of an expense to protect against? Is either any more certain than the other to have otherwise contributed to the public revenues, or better able to contribute? These questions admit of none but negative answers. * * * Clearly, such classification as this cannot have sprung from any general public purpose, nor be germane to any. It is not equal protection of the laws to all people similarly situated with reference to that law."

And so, in the case at bar, the time limitation has been shown not to have sprung from any general public purpose and not to be germane to any. It unconstitutionally handicaps the appellant who is in the same class as the dealers upon whom the underselling privilege was conferred and it must, consequently, be condemned as unconstitutional.

In Chicago, M. & St. P. Ry. Co. v. Westby, 178 Fed. 619, the employer's liability law of South Dakota was declared unconstitutional by reason of the 14th Amdt. In so holding, the court, at page 625 laid down the following as one of the indispensable conditions for valid class legislation:

> "All who are in a situation and circumstances relative to the subject of the discriminatory legislation indistinguishable from the situation and circumstances of the members of the class must be brought under the influence of the legislation and treated by it in the same way as are the members of the class. 'An act of class legislation to stand in the face of the Constitution must include all who belong to the class—not all who bear similarity in some characteristics to those included, but all who cannot be distinguished from them in that particular characteristic which justifies the act * * *' Sams v. St. Louis & M. R. Co., 174 Mo. 53; Johnson v. St. Paul & Duluth R. Co., 43 Minn. 222, 224; Lodi Township v. State, 51 N. J. L. 402."

The appellant is in a situation and circumstances relative to the differential provision indistinguishable from the situation and circumstances of the dealers of April 10, 1933 and must be brought under the influence and protection of the differential provision. *The appellant cannot be distinguished from the other dealers in the particular characteristic which justifies the differential provision, namely—the lack of a well advertised trade name.*

In Fountain Park Co. v. Hensler, *et al.*, 199 Ind. 95, a statute giving Chautauqua associations, having certain qualifications, the right of eminent domain was held void as violating the 14th Amendment because intended to apply to one corporation alone. At page 467, the court said:

> *"The legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and thereupon enact different rules for the government of each.* (Italics ours.) State v. Julow, 129 Mo. 163; State v. Miksicek, 225 Mo. 561. In the case at bar all Chautauqua companies which, as such, possess common attributes and stand in like situation with relation to any public necessity that might exist for their obtaining a site, are split up, and a subclass—a very small subclass, of such companies, to wit, those which have existed and conducted meetings for 16 days a year continuously for 15 years, and which have held a lease for all of said period on a tract of timber land—has been singled out as the recipient of the benefits conferred by the statute."

In the case at bar, the language used in the Hensler case, is most appropriate. Here the legislature has taken what might be termed a natural class of milk dealers—those selling unadvertised milk in the City of New York—split that class in two by means of the time limitation, and then arbitrarily designated the dissevered fractions of the original unit as two classes and given an underselling privilege to one which it has denied to the other. What could be a clearer violation of the equal protection clause?

In U. S. Automobile Service Club v. Winkle, 128 Oregon, 274, the court was considering a statute which provided for licensing motor club service companies, section 4 thereof providing for a deposit of cash or bond of $25,000 with the state treasurer unless companies rendering service had operated within the state for more than 5 years and had a paid membership of more than 5000 members. In holding Section 4 invalid under the 14th Amdt., the court said:

> "The classification provided for by §4 of the act is not founded upon any substantial difference between the two classes provided for. It denies to plaintiff the equal protection of the laws by imposing upon plaintiff a burden which is not imposed upon one of plaintiff's competitors, which is engaged in the same pursuit at the same time and under like circumstances, and therefore violates the 14th Amdt. of the Federal Constitution."

The holding in the Winkle case must apply to the time limitation in the case at bar. Here the appellant, an unadvertised dealer, must charge 1¢ per quart more for its milk than its competitors. A burden has thus been placed upon appellant which is not imposed upon appellant's competitors, all of whom are engaged in the same pursuit at the same time and under like circumstances.

In *ex parte* Wacholder, 1 Cal. App. (2nd) 260, one Wacholder was arrested for violating an ordinance, §3 of which provided that each retail merchant of flowers and plants engaged in business for more than 180 days last past shall pay an annual license fee of $6. and §4 of which provided that every person and corporation desiring a license and not having been engaged in the business for at least 365 days last past shall, in addition, post a cash bond in the sum of $500.

The court, in condemning the ordinance under the 14th Amdt., held:

> "Here is a plain discrimination between the persons engaged in a like business made dependent upon the time in which they have been so engaged."

In Cook Coffee Co. v. Village of Flushing, 267 Mich. 131, a village ordinance providing that "(c) Those rep-

resenting retail or wholesale establishments which have been engaged in business in the Village of Flushing three months or longer" shall be exempt from payment of fees for licenses under a hawking and peddling ordinance, was condemned and held unconstitutional in view of the Fourteenth Amendment.

In the latter case, as in the Wacholder case, discrimination between persons engaged in the same business based on the length of time in business, was held repugnant to the equal protection clause. The time limitation in the case at bar, must be held unconstitutional for the same reason.

In State v. Hinman, 65 N. H. 103, a statute, requiring certain professional men to obtain licenses, which exempted from its provisions those who resided and practised their profession in the town or city of their present residence during all the time since January 1, 1875, was held void and unconstitutional because "by an arbitrary test, having no reference to skill, learning, or fitness for the practice of the profession, certain persons are exempted from the payment of a license fee to which others of equal, and perhaps superior, acquirements and experience are subjected" and that the exemption was a discrimination "founded solely upon the accidental circumstances of residence or of a change of residence" and therefore fell within the prohibition of the constitution.

What was said in the Hinman case is equally true of the case at bar. By an arbitrary test—existence in business on April 10, 1933—having no reference to skill, learning, fitness, qualification, equipment, or fi-

nancial responsibility for the conduct of the milk business, a selected group of dealers is given the privilege of selling milk at one cent per quart less than all other dealers. The discrimination in the case at bar is even worse because in the Hinman case, the favored group were merely exempted from the payment of a license fee—a handicap which the group discriminated against could probably overcome by charging higher prices for their services after being licensed. Here the appellant is subjected to a burden constituting a continuing competitive disadvantage which it cannot possibly overcome and which means its complete ruin.

For cases in the state of Wisconsin establishing and following the principle that classifications made by a state must not be based on existing circumstances only and must permit new persons and things to take their rightful place in the classification made, see Johnson v. City of Milwaukee, 88 Wisc. 383, 390-392; State *ex rel.* Resch v. Trustees, 121 Wisc. 44, 54; Servonitz v. State, 133 Wisc. 231, 238; Borgnis v. Falk Co., 147 Wisc. 327, 353, 354.

In Nichols v. Walter, 37 Minn. 264, at page 271, the court, in condemning as unconstitutional a law classifying counties and providing a mode for removing county seats according to each classification, said:

> "We quote again from State v. Hammer: 'There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least,

account for or justify the restriction of the legislation.'

* * *

But the counties were, at the date of the act, identified and their *status* fixed for all time, by reference to the specified event, as fully as though the counties were named. There is nothing in the event which is the basis of classification which suggests any necessity or propriety for a different rule to be applied to the counties thus placed in the two classes. Why one county which had located its county-seat by a vote of its electors twenty-five years or six months before the act passed should require a vote of three-fifths of its electors to remove it, and a county which should so locate it three or six months after the act passed may again remove or locate it upon a mere majority vote, is impossible to conceive, except that the legislature has arbitrarily so divided. But in such matters the legislature cannot arbitrarily so provide. The act is unconstitutional and void."

Just as the counties were identified and their status fixed for all time in the Nichols case, so are the favored unadvertised dealers in the case at bar identified and their status fixed by the date—April 10, 1933—. As long as the State of New York continues to fix the prices at which milk shall be sold in the state (it has been three years already and it will probably be longer) that date will prevent the appellant from coming into the class of unadvertised dealers where it naturally belongs unless this court will grant the appellant the relief it seeks.

In Davis Construction Co. v. Board, 192 Ind. 144, an act which sought to relieve "contractors engaged in bridge and highway construction" from consequences growing out of the increase of prices resulting from the world war, and to allow a cancellation of

their contracts, was declared invalid. The act did not include all contractors, or all contractors of public work, but only the subclass above noted. The court said:

> "An artificial, arbitrary and unreasonable classification, as by designating certain individuals by name or description out of a larger number whose situation and needs do not differ from theirs, is forbidden by the Constitution."

In the case at bar, the legislature might just as well have named the favored milk dealers in the law. If the names of the 150 or more milk dealers of April 10, 1933, who were given the underselling privilege, were written out in the law, would anybody then say that the time limitation was constitutional as having some relation to the legal purposes of the milk control law? Of course not. But the use of the time limitation rather than the specific names of the select group does not change the nature of the classification made by the time limitation from a special, unconstitutional one to a general and constitutional one.

In Louisville & N. R. Co. v. Railroad Comr. of Tennessee, 19 F. 679, at page 695, the court, in holding invalid a statute, a section of which declared that none of the provisions of the act shall apply to any railroad then being constructed, or which might thereafter be constructed in the state "until ten years from and after its completion", said:

> "Wherefore this distinction between existing roads and roads to be thereafter built? If the act was a proper regulation, why not apply it to roads to be hereafter built? If the legislature can thus draw the line between different railroads based on the date at which they were or are to be construct-

ed, where and at what point is legislative discrimination to cease? If the legislature can thus discriminate between new and old roads, it can assume any other arbitrary basis in support of invidious legislation, and in this way oppress one interest for the benefit of another; and if it can do this, the foregoing wise and just provisions of the state and national constitutions, intended to secure an equality of rights to every citizen, may as well be eliminated from those sacred instruments."

In the case at bar, the same question asked in the Louisville case may be propounded: Wherefore the distinction between existing unadvertised dealers and dealers thereafter entering the field? If the underselling privilege classification based upon the well-advertised trade name is constitutional and, appellant cannot and does not question that here, why not give the privilege to new unadvertised dealers. They need the privilege just as much, if not more, than the old unadvertised dealers.

If the time limitation in the instant case operated in favor of new milk dealers, as the limitation in the Louisville case did for new railroads, there would be no question about it being arbitrarily discriminatory, yet such a discrimination would be more logical from the standpoint of its practical effect, for new dealers have to establish themselves in the trade whereas the old ones already have their customers.

In Tugman v. City of Chicago, 78 Ill. 405, the court in declaring invalid an ordinance which prevented the use and operation of slaughter houses erected after the first day of January, 1872, while those erected prior

to that time were left free to be operated as the owners thereof desired, said at page 409:

> "If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.
>
> The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period."

The principle involved in the Tugman case governs the facts of the case at bar. Just because certain unadvertised dealers were engaged in the milk business at the time the first milk control law was enacted, is no reason why they should have had bestowed upon them by the legislature an underselling privilege which created for them a virtual monopoly in the business of wholesaling milk to the exclusion of new dealers like the appellant.

In Alexander v. City of Elizabeth, 56 N. J. L. 71, an act which made it unlawful for anyone to maintain a race course in New Jersey, which was not used for racing purposes prior to the 1st day of January, 1893, unless a certified copy of a resolution of necessity was procured and filed with the secretary of state, provided that with respect to those courses used prior to that date, licenses could be granted without qualification or

restriction. The court, in holding the statute unconstitutional, at page 81 said:

> "It has been inquired, upon what principle can a classification of race courses into those used and maintained before and those used and maintained after January 1st, 1893, be sustained? What, in this view, is the substantial difference between them which requires a different system of legislation applicable to each? Where are the characteristics sufficiently marked and important to make them distinct classes? I can perceive no such differences and no such characteristics; nor can I perceive any reasonable ground on which one class should require any different legislation from that which the other requires.
>
> To make a classification good it must be founded upon differences and characteristics sufficiently marked and important to make them naturally a class by themselves. (Citing cases.) There are no qualities in race-courses which are sufficiently marked and important to distinguish those in use prior to January 1, 1893, from those set up after that date. Legitimate classification rests on the quality of its members, not on the particular time when those qualities were acquired. (Citing cases.)"

And so, in the case at bar, as in the Alexander case, legitimate classification should rest on the quality or nature of milk dealers, not on the particular time when that quality or nature—the quality of being an *unadvertised* dealer—was acquired.

For other cases in the state of New Jersey, condemning arbitrary time limitations, see State v. Post, 55 N. J. L. 264; State *ex rel.* Pierson v. O'Connor, 54 N. J. L. 36; Pavonia Horse Railroad Co. v. Jersey City, 45 N. J. L. 297; Stahl v. Trenton, 54 N. J. L. 444.

In Sutton v. State, 96 Tenn. 696, a so-called "no fence law" was under consideration. The counties in which it was to operate were classified by population solely with reference to the census of 1890, without making any provision as to changes of population that might occur or be shown by any subsequent census. The court held the law invalid and laid down this rule as to valid class legislation:

> "Legislation intended to affect a particular class, and not the public at large, must extend to and embrace equally all persons who are *or may be* in the like situation and circumstances, and the classification must be natural and reasonable, not arbitrary and capricious."

The vice of the time limitation in the case at bar lies in the fact that it does not permit new dealers who enter the field selling unadvertised brands of milk to take their lawful place in the classification of unadvertised milk dealers. The legislature, by inserting the time limitation in the privilege provision, lost sight of the fact that new unadvertised dealers would be in the same class as the existing unadvertised dealers and would require the underselling privilege to meet the competition not only of the well-advertised dealers but also of the longer established unadvertised dealers.

In Pabst Corporation v. Milwaukee, 190 Wisc. 349, it was held that a classification of public utilities for the purpose of regulation, *into those in existence before and those created after a specified date* is purely arbitrary and without reason and was invalid.

In Northwestern National Insurance Co. *et al.* v. Fishback, 130 Washington 490, the court held invalid

a statute which provided that no insurance company, writing fire or automobile insurance, shall have more than one agent in any city of this state having a population of 50,000 or less, or more than two agents in cities of over 50,000 inhabitants. The court after holding that the occupation of insurance agent is a lawful business, and not one which it is within the power of the State to prohibit, stated at p. 494:

> "But the act of 1923 is not an attempt to regulate the insurance business. It is, in effect, nothing more than the creation of a favored class, who are permitted to engage in the lawful business of acting as insurance agents to the exclusion of everyone else from that business; and this excludes a great number of persons who, from time immemorial, have acted as insurance agents. We all know that real estate agents, lawyers and persons following many other lines of business, have been accustomed to write insurance as a 'side line.' We cannot but feel that the legislature had in view no welfare of the public, but that this legislation is an attempt to monopolize the business of writing insurance. We agree with what the Supreme Court of Missouri, in Moler v. Whisman, 243 Mo. 571, said in holding unconstitutional a law passed in the interest of barbers.
>
> 'Possibly some barbers, like some lawyers and other persons who have obtained successful and remunerative positions in professional and commercial life, become anxious to shut out competition by "burning the bridges behind them" so to speak; but such a scheme is entirely un-American, because it is the policy of a free commonwealth to encourage thrift and industry among its citizens, and to keep the door of opportunity ajar so that every qualified and deserving person who so desires may enter thereat.'"

In this case, the favored class, the independent dealers of April 10, 1933 have "burned the bridges behind them" by closing the door to appellant and others

similarly situated—a most un-American and unconstitutional scheme.

Two similar cases in New York State in which certain persons engaged in the insurance and undertaking businesses had attempted unsuccessfully to shut the door to new competition in their respective fields are Hauser v. N. B. & Merc. Ins. Co., 206 N. Y. 455 and People v. Ringe, 197 N. Y. 143. See Southeastern Electric Co. v. City of Atlanta, 179 Georgia 514, for still another such case with respect to the electrical business.

The cases discussed under this point show quite clearly that it has been uniformly held throughout the various jurisdictions that discriminations between persons engaged in a like business based upon the time of entry into the business or made dependent upon the time in which they have been so engaged are arbitrary and unconstitutional. The inevitable conclusion, therefore, is that the appellant has been unconstitutionally barred from taking its place in the "unadvertised" class and must hereafter be given the underselling privilege presently exercised by members of that class.

POINT III.

The time limitation is separable and may be excised from the unadvertised differential provision without doing violence to the intention of the Legislature and without hampering or impairing the effectiveness of the provision or the Milk Control Law. On the contrary, its deletion will carry out the purpose of the provision and of the entire law.

The appellees will probably contend here as they have urged in the courts below that this court is with-

out power to delete the arbitrary time limitation from the unadvertised differential provision and allow the remainder of the provision to stand, despite the fact that the remainder of the provision, without the time limitation, will be workable and will carry out the purpose for which it was enacted, namely the protection of unadvertised dealers from the well-advertised dealers in the City of New York.

The court below found the time limitation to be constitutional; hence, it was not necessary to consider and the court did not pass upon the question of severability. It is only when a part of a statute is held *unconstitutional,* that the question of its *severability* arises.

In the dissenting opinion, however, the time limitation was found to be unconstitutional and, quite properly, the dissenting judges gave their attention to the question of severability and found that the time limitation was separable and could be deleted from the unadvertised differential provision (R., p. 60).

Appellant submits that the conclusion of the dissenting judges below is entirely correct. It is fundamental that courts are reluctant to declare unconstitutional any greater part of a statute than is absolutely necessary for a decision in the case on the facts involved. Furthermore, the very same section in which the unadvertised differential provision appears (§258-q-Ag. & Markets Law) contains a separability clause which provides that a judgment of invalidity of any clause, sentence, paragraph or part of the article "shall not affect, impair or invalidate the remainder thereof, but

shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered."

The presence of the separability clause in the milk control law

> "has the effect of reversing the common law presumption, that the legislature intends an act to be effective as an entirety, by putting in its place the opposite presumption of divisibility; and this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that the legislature would not have been satisfied unless it had included the invalid part. Williams v. Standard Oil Co., 278 U. S. 235, 241-2."
>
> Utah Power & Light Co. v. Pfost, 286 U. S. 165, 185-6.

And in Champlin Refining Co. v. Commission, 286 U. S. 210, at pages 234 and 235, this court said:

> "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped *if what is left is fully operative as a law.* (Italics ours.) Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 565. Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 635. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 395-396. Field v. Clark, 143 U. S. 649, 695-6."

The recent cases in the Court of Appeals have clearly shown the attitude of the New York State Courts. In People *ex rel.*, Alpha P. C. Co. v. Knapp, 230 N. Y. at page 60, Chief Judge Cardozo, after stating that the

state court could speak with final authority on the propriety of severance, said:

> "In this State, we have gone far in sub-dividing statutes, and sustaining them so far as valid. The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. The principle of division is not a principle of form. It is a principle of function."

And at page 63:

> "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert."

Even where a single section of a statute attempts or purports to cover two entirely distinct and separate classes of cases, one properly and the other improperly, it may be upheld as to the class which constitutionally may be thus covered even though condemned as to the other. Dollar Co. v. Canadian C. & F. Co., 220 N. Y. 278 and cases cited at page 279.

The legislative presumption, as well as judicial presumption and precedent, requires that this court be able to see upon the face of the differential provision or *that appellees must show by something far more substantial than a mere guess or conclusion that the time limitation is so inherently connected with the differential provision in subject matter, meaning or purpose, that it cannot be presumed the Legislature would have passed the latter without the former. In re* Village of Middletown, 82 N. Y. at p. 202; People v. Kenney, 96 N. Y. at p. 303; People v. Briggs, 50 N. Y. 566.

And so, in the case at bar, the reason for the enactment of the differential provision, as found by this court in Borden's Farm Products Co. v. Baldwin, *supra*—protection of unadvertised against advertised dealers—will be carried out by deleting the unconstitutional time limitation from it. The burden is upon the appellees to show otherwise.

As was said by the dissenting judges in the court below (R., p. 60):

> "With the arbitrary time limitation excised from the unadvertised differential provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well-advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded."

A glance at the remainder of the unadvertised differential provision shows a complete, workable provision carrying out the purpose of the legislature underlying its enactment—the protection of unadvertised milk dealers in the city of New York against the well advertised dealers of that city:

> "It shall not be unlawful for any milk dealer who [since April tenth, nineteen hundred thirty-three] has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more

than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

It is respectfully submitted that the order and judgment of the Supreme Court of the State of New York affirming the order of confirmation of the Appellate Division and the determination of the Appellees should be reversed with costs and disbursements to the Appellant, in all courts.

MAX COHEN,
Counsel for Appellant.

SEYMOUR ELLENBOGEN,
BERNARD ELLENBOGEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 349

MAYFLOWER FARMS, INC.,

Appellant,

vs.

CHARLES H. BALDWIN, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION.

HENRY S. MANLEY,
Counsel for Appellees.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction	1

Table of Cases Cited.

Borden's Farm Products Co. v. Baldwin, 293 U. S. 194	3, 4
Matter of Mayflower Farms, Inc., v. Baldwin, 242 App. Div. 881-882 mem., affirmed 267 N. Y. 9	1

Statute Cited.

Milk Control Law (ch. 126 of N. Y. Laws of 1934, section 258-q)	2

SUPREME COURT OF THE UNITED STATES

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No. 349

MAYFLOWER FARMS, INC.,

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vs.

CHARLES H. BALDWIN, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, AND ANOTHER,

Appellees.

STATEMENT OPPOSING JURISDICTION.

This appeal is taken from an order of the Supreme Court of the State of New York, in a certiorari proceeding, affirmed by the Court of Appeals of the State. The decisions below are reported, *Matter of Mayflower Farms, Inc.* v. *Baldwin*, 242 App. Div. 881-882 mem., affirmed 267 N. Y. 9.

It is respectfully suggested that no constitutional question is necessarily involved in this case, because the feature of the statute by which the appellant is aggrieved, even if it is unconstitutional, is not separable from other parts of the statute so that the plaintiff will obtain any relief by an adjudication of unconstitutionality.

The statutory provision, so far as now relevant, is a single sentence of the Milk Control Law (Ch. 126 of N. Y. Laws of 1934, Section 258-q) as follows:

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Appellant has not been engaged continuously in business since April 10, 1933; it was not incorporated until May, 1933. It insists, nevertheless, that it is entitled to sell at the lower price. There is no provision authorizing such a price for any dealer except the statutory language quoted above. Obviously it is inapplicable to the appellant, unless by a very peculiar operation of judicial surgery.

The majority opinion of the Court of Appeals passed over that question, addressed itself to the constitutional question, and upon that question decided against the appellant. That was sufficient ground to decide against the appellant, but the dissenting opinion of Judge Finch found it necessary, as will any opinion that is written for the relief of the appellant, to decide the question of separability. That question is essential to the appellant's case, and unless it can be decided in the appellant's favor no constitutional question is presented.

The dissenting opinion dealt with the question of separability as follows:

> "Although the time limitation clause is unconstitutional as denying to the appellant the equal protection of the laws, this does not require that the entire provision be declared a nullity. The section contained a separability clause and it is only necessary to delete the offending clause, viz: 'since April 10, 1933.' With the arbitrary time limitation excised from the unadvertised differential provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded."

It is respectfully submitted that the dissenting opinion erred upon the question of separability, and that "judicial surgery" should not be exercised for the purpose of extending to the appellant and other new dealers the benefit of a somewhat remarkable statutory provision, not extended to them by the Legislature.

The Legislature was moved by the anticipated hardship of an even price, upon dealers whose existing businesses depended upon continuing sales at a lower price, to make them a concession which this Court has said is "novel, if not unique." (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194.) The Legislature made the concession only to the extent that it was needed. It intended merely to save *existing* business done on the lower price level; it had no intention of encouraging new dealers to come in on that

basis. There is no reason to suppose that the Legislature would have made the privilege to sell at the lower price apply alike to new and old dealers in unadvertised milk if it had been told that it could not limit the privilege to old dealers.

The appellant can be saved only by judicial extension of a statutory provision not favored by this Court, along lines which the Legislature did not intend and probably would not have approved, and of such nature as to aggravate the charges being made against the statutory provision as a whole in the *Borden* suit. The constitutional argument of the appellant is not within the jurisdiction of the court because even a favorable answer would be no defense to the appellant.

However, it is understood that the *Borden* suit will be before the Court again at the present term, and the labors of the Court probably will not be greatly increased by hearing the present appeal with it, at which time the relation between the two questions involved in the present appeal (separability and constitutionality) can be more fully considered.

It is respectfully submitted that in the present appeal the question of jurisdiction be deferred until oral argument.

HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets and Attorney for the Appellees.

Dated, Albany, July 26, 1935.

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IN THE

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OCTOBER TERM, 1935.

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MAYFLOWER FARMS, INC.,

Appellant,

against

PETER G. TEN EYCK, Commissioner of the Department of Agriculture and Markets of the State of New York, and KENNETH F. FEE, Director of the Division of Milk Control in the Department of Agriculture and Markets of the State of New York,

Appellees.

BRIEF FOR APPELLEES.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York.
HENRY EPSTEIN,
Solicitor General.
HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets,
Attorneys for Appellees.

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INDEX.

Page

Facts 1

Summary of Argument 1

Argument

POINT I. There was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. The classification is not unconstitutional 2

POINT 2. Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The Court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision 9

TABLE OF CASES CITED.

Abie State Bank v. Bryan, 282 U. S. 765 14

Arkansas So. R. R. v. German Bank, 207 U. S. 270 14

Aurora v. Burns, 319 Ill. 84 7

Baylis v. Van Nostrand, 176 App. Div. 396 8

Borden's Farm Products Co. v. Baldwin, 293 U. S. 194 ..... 3, 11

Buck v. Bell, 274 U. S. 200 5

Champlin Rfg. Co. v. Commn., 286 U. S. 210 13

City Bank F. T. Co. v. N. Y. C. R. R. Co., 253 N. Y. 49 14

City of New York v. Kelsey, 158 App. Div. 183 8

City of Norton v. Hutson, 142 Kan. 305 8

Commonwealth v. Charity Hospital, 198 Pa. 270 8

Commonwealth ex rel. Elkin v. Charity Hospital, 199 Pa. 119 8

Commonwealth v. Ward, 136 Ky. 146 7

Connolly v. Union Sewer Pipe Co., 184 U. S. 540 13

Cooper v. Rollins, 152 Ga. 588 7

Criswell v. State, 126 Mo. 103 7

Dent v. West Virginia, 129 U. S. 114 6

Dorchy v. Kansas, 264 U. S. 286 ..... 13, 14

Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157 14

Ex parte Whitley, 144 Cal. 167 7

Fox Film Corp. v. A. B. Muller, Sup. Ct. U. S., Dec. 9, 1935 14

Hauser v. N. B. & Merc. Ins. Co., 206 N. Y. 455 13

Lynch v. United States, 292 U. S. 571 13

Manheim v. Harrison, 164 La. 564 7

Moritz v. United Brethrens Church, 269 N. Y. 125 8

Nichols v. Walter, 37 Minn. 264 13

People ex rel. Alpha P. C. Co. v. Knapp, 230 N. Y. 48 14

People v. Griswold, 213 N. Y. 92 6

People v. Logan, 284 Ill. 83 7

People v. Mancuso, 255 N. Y. 463 14

Sammarco v. Boysa, 193 Wis. 642 7

Page

Spector v. Building Inspector, 250 Mass. 63 7
Sperry & Hutchinson Co. v. Rhodes, 220 U. S. 502 5
Sprague v. Thompson, 118 U. S. 90 13
Standard Oil Co. v. Charlottesville, 42 Fed. (2nd) 88 7
Stanley v. Utilities Comm'n, 295 U. S. 76 8
State v. Creditor, 44 Kan. 565 7
Utah Power & L. Co. v. Pfost, 286 U. S. 165 13
Watson v. Maryland, 218 U. S. 173 5
Williams v. Standard Oil Co., 278 U. S. 235 13

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Appellees.

BRIEF FOR APPELLEES.

Facts.

Appellant's statement of the case is correct, except that three paragraphs on page 5 lack clear support from the record. None of them is important, all may be true, and each has sufficient support in the record to show that the misstatement, if any, is unintentional. In the interest of strict adherence to the record the following corrections are made: (a) As to paragraphs 3 and 6, it does not clearly appear that "Puritan" is a trade name for the milk sold by Supreme Milk and Cream Company, or that the five other dealers are sell-

ing the same milk. (b) As to paragraph 8, it does not clearly appear that the milk sold at the lower price is the same kind of milk, or sold by competitors, and testimony at page 38 of the record suggests that the lower priced milk referred to is that sold at 8 cents by the Public Health Stations.

Summary of Argument.

1. There was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. The classification is not unconstitutional.

2. Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The Court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision.

POINT I.

There was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. The classification is not unconstitutional.

Appellant was incorporated in May, 1933, soon after enactment of the original milk control law. It commenced business in September, 1933. (R. 11.) The original milk control law contained what was essentially the provision quoted below. That was chapter 158 of 1933, section 317, subdivision *e*. The material shown in

brackets was eliminated when the statute was revised in 1934, and the material shown in italics was added. As enacted by chapter 126 of 1934, section 258-q, the provision is as follows, ignoring the matter in brackets:

> "It shall not be unlawful for any milk dealer who [at the time this act shall take effect is] *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed [by the board] for such sales to stores in such a city."

The reason for the latter insertion, making the lower price applicable to sales from stores to consumers, is of no present importance. See 1933 *Op. Atty. Gen.* 408.

The reason for the other change is that the earlier law became effective on April 10, 1933, and the 1934 law continued reference to that same date. So far as the present question is concerned the 1934 and 1935 laws provide just what the original law provided. Can that discrimination in the original law, between dealers in business before it was enacted and those entering business thereafter, be justified?

The case of *Borden's Farm Products Company v. Baldwin* (No. 597 for the present term; argued Jan-

uary 6, 1936) involves a different and broader constitutional question. That suit was brought by one of the advertised dealers, which claims that there is no justification for compelling it to sell milk to stores for a cent more than the selling price of its "unadvertised" competitors. The present appellant does not make that claim, because it would gain nothing if it succeeded. If the entire "unadvertised differential" provision is bad, as Borden's contends, then the present appellant clearly is not entitled to any benefit from it. The present appellant's constitutional proposition necessarily assumes the general constitutionality of the "unadvertised differential", and says that it (the appellant) is entitled to sell at the lower price, and that its incorporation since April 10, 1933, is no valid reason for excluding it from enjoyment of the lower selling price allowed to older "unadvertised" dealers.

For the purpose of testing the narrow question of constitutionality involved in the present case it is necessary to examine the facts underlying the statute. Those are covered so fully in the several opinions which have been written in the Borden's litigation that for present purposes they will merely be summarized.

It seems that before the 1933 milk control law passed the "independent" or "unadvertised" dealers became worried about how they would keep their trade under a system of fixed resale prices. The fact that sales of "bulk" milk were to cease on June 1, 1933, was a serious aggravation of the trouble. There was reason to fear that on an equal price basis most of the business of selling milk through stores would pass into the hands of large and well-known dealers. To

meet that practical situation, and save existing businesses of "unadvertised" dealers from confiscation, the "differential" provision was introduced into the statute. But it was limited in its scope by the reason for it. The Legislature did not wish to increase and intensify the lower-price competition against the "advertised" dealers by permitting new dealers to join it, and if persons and corporations wanted to make investments in the milk business after April 10, 1933, they were required to attach themselves to the higher-price group.

New legislation frequently makes important distinctions with relation to its effective date, and such classification, far from being arbitrary and unfair, often is necessary to protect from an unfair burden those who began business before the statute was contemplated. In *Sperry & Hutchinson Co. v. Rhodes,* 220 U. S. 502, 505, Mr. Justice Holmes said:

> "The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time."

In *Buck v. Bell,* 274 U. S. 200, 208, he said:

> "The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."

Watson v. Maryland, 218 U. S. 173, involved a statute for examining and registering physicians. Watson was convicted of practising without having been registered, and he said that the law was unconstitutional because it exempted from examination certain physi-

cians who were practising before the law was enacted. The Court said (pages 177, 178):

> "In such statutes there are often found exceptions in favor of those who have practiced their calling for a period of years. In *Dent v. West Virginia*, 129 U. S. 114, an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts. In the statute under consideration, the excepted class were those who had practiced before the 1st day of January, 1898, being more than four years before the passage of the law, and who could show, presumably with a view to establishing that they were actively practicing at that time, that they had treated at least twelve persons, within one year of that date. * * * We see nothing arbitrary or oppressive in the classification of physicians subject to the provisions of this statute."

The case of *People v. Griswold*, 213 N. Y. 92, is to similar effect. The statute regulated the practice of dentistry, with an exception for those who were practising at a certain period before the statute was enacted. Said the Court (page 97):

> "The appellant has no grievance from the provision that those duly licensed and registered as dentists in this state prior to the first day of August, 1895, are deemed licensed to practice. It is the rule for such acts to preserve the status of those lawfully engaged in the pursuit regulated."

See, to similar effect as to exemption from examination of barbers who were active at the time the law

was enacted or a certain number of years before, *Cooper v. Rollins,* 152 Ga. 588, 110 S. E. 726; *People v. Logan,* 284 Ill. 83, 119 N. E. 913; *Criswell v. State,* 126 Md. 103, 94 Atl. 549; *Commonwealth v. Ward,* 136 Ky. 146, 123 S. W. 673. Cases of statutes regulating dentists, and upholding a similar exception, are *State v. Creditor,* 44 Kan. 565, 24 Pac. 346, and *Ex parte Whitley,* 144 Cal. 167, 77 Pac. 879.

In the case of *Sammarco v. Boysa,* 193 Wis. 642, 215 N. W. 446, the Wisconsin Supreme Court upheld a Milwaukee ordinance against keeping automobiles in wooden garages, with an exception for pre-existing garages housing not more than two cars. The Court listed several classes of laws which ordinarily are limited to "prospective" operation, such as zoning laws, and said:

> "To assert that the ordinance here under consideration denies the equal protection of the law would not only defeat the purpose of zoning laws in general, but it would amount to a declaration that society is powerless to prevent the growth and development of an evil without completely stamping out the evil. * * * Consideration for existing property rights furnishes a legitimate basis for classification with reference to legislation such as this. Indeed, laws of this character are more frequently attacked because they invade existing property rights."

Zoning ordinances making exceptions for existing nonconforming buildings have frequently been upheld. See *Manheim v. Harrison,* 164 La. 564, 114 So. 159; *Aurora v. Burns,* 319 Ill. 84, 149 N. E. 784; *Spector v. Building Inspector,* 250 Mass. 63, 145 N. E. 265. The case of *Standard Oil Co. v. Charlottesville,* 42 Fed. (2nd) 88, cited at pages 43-44 of appellant's brief, ap-

pears to be to the contrary, but is quite distinguishable upon its peculiar facts and the view the Court took of them.

In the case of *City of Norton v. Hutson,* 142 Kan. 305, 46 Pac. (2nd) 630, it was held that the erection of a new cream buying station in a certain block could be prohibited under a zoning ordinance, although it permitted the continued operation of an existing station. The principle of abolishing nuisances gradually, or merely preventing their increase, is somewhat akin to the favor which existing facilities receive under public utility regulation. For an example of that, see *Stanley v. Utilities Commn.,* 295 U. S. 76.

City of New York v. Kelsey, 158 App. Div. 183, affirmed 213 N. Y. 638 mem., upheld a statute which forbade establishing any new cemetery within half a mile of the water supply, but provided that burials could continue in existing cemeteries. The Appellate Division said:

> "It [the Legislature] could have said, as it did say, that there were in its judgment sufficient of these existing burial grounds, and that there should be no further extensions or additions to them."

See, to similar effect, *Baylis v. Van Nostrand,* 176 App. Div. 396, and *Moritz v. United Brethrens Church,* 269 N. Y. 125. The cases of *Commonwealth v. Charity Hospital,* 198 Pa. 270, 47 Atl. 980, and *Commonwealth ex. rel. Elkin v. Charity Hospital,* 199 Pa. 119, 48 Atl. 906, upheld a Pennsylvania statute forbidding the establishment of any additional hospital, pesthouse or burial ground in the built-up portions of cities, but saving those already established.

The cases already cited under this point will serve to illustrate that there is no inflexible constitutional prohibition against treating as a separate class those persons in a business at the time it is first subjected to regulation. The question is whether the lines of classification are clearly unreasonable under the facts of the business regulated. It is respectfully submitted that there was good reason for limiting the privilege of selling at the "unadvertised" price to dealers who were in business on April 10, 1933, when the original milk control law was enacted. That classification is not unconstitutional.

POINT II.

Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision.

The statutory provision, so far as now relevant, is a single sentence of the Milk Control Law (Ch. 126 of N. Y. Laws of 1934, Section 258-q) as follows:

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event

shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

Appellant has not been engaged continuously in business since April 10, 1933; it was not incorporated until May, 1933, and commenced business in September. (R. 11.) It insists, nevertheless, that it is entitled to sell at the lower price. There is no provision authorizing such a price for any dealer except the statutory language quoted above. Obviously it is inapplicable to the appellant, unless by a very peculiar operation of judicial surgery.

The majority opinion of the Court of Appeals passed over that question, addressed itself to the constitutional question, and upon that question decided against the appellant. That was sufficient ground to decide against the appellant, but the dissenting opinion of Judge Finch found it necessary, as will any opinion that is written for the relief of the appellant, to decide the question of separability. That question is essential to the appellant's case, and unless it can be decided in the appellant's favor there is no need to decide the constitutional question.

The dissenting opinion dealt with the question of separability as follows:

> "Although the time limitation clause is unconstitutional as denying to the appellant the equal protection of the laws, this does not require that the entire provision be declared a nullity. The section contained a separability clause and it is only necessary to delete the offending clause, viz: 'since April 10, 1933.' With the arbitrary time limitation excised from the unadvertised differential

> provision, the appellant will assume its rightful place in the class of milk dealers selling unadvertised milk and be able to meet the competition if it can, not only of the well advertised dealers, but also of the unadvertised dealers who already have an established business and are selling the same product in the same territory as the appellant. Thus will the arbitrary, unreasonable and invalid time limitation be destroyed and at the same time the original purpose of the law, to protect the milk producer, to preserve competition and to stabilize milk prices, be promoted and safeguarded." (R. 60.)

It is respectfully submitted that the dissenting opinion erred upon the question of separability, and that "judicial surgery" should not be exercised for the purpose of extending to the appellant and other new dealers the benefit of a somewhat remarkable statutory provision, not extended to them by the Legislature.

The Legislature was moved by the anticipated hardship of an even price, upon dealers whose existing businesses depended upon continuing sales at a lower price, to make them a concession which this Court has said is "novel, if not unique." *(Borden's Farm Products Co. v. Baldwin,* 293 U. S. 194, 203.) The Legislature made the concession only to the extent that it was needed. It intended merely to save *existing* business done on the lower price level; it had no intention of encouraging new dealers to come in on that basis. There is no reason to suppose that the Legislature would have made the privilege to sell at the lower price apply alike to new and old dealers in unadvertised milk if it had been told that it could not limit the privilege to old dealers.

For the purpose of testing that question the language used in the statute is significant. The dissenting opinion and the appellant's brief assume that the statute and order impose a command substantially as follows:

> "No milk dealer shall sell bottled Grade B milk to a New York City store for less than 10¾ cents per quart;"
>
> "Except that all dealers in unadvertised milk may sell for 9¾ cents per quart;"
>
> "But the exception shall not apply to dealers in unadvertised milk who have commenced such business since April 10, 1933."

If the command of the Legislature really were divisible into those three separate steps, either by its reason or its grammatical relationships, a stronger argument could be made for cutting off the final proviso. Such is not the fact, as can be seen by examining either the statutory provision or the reasons that shaped it. The fact is that the exception is single and inseparable, of an inclusiveness exactly proportioned to the need for it, and that the appellant can be saved only by judicial extension of a statutory provision not favored by this Court, along lines which the Legislature did not approve and probably would not have approved and of such nature as to aggravate the charges being made against the statutory provision as a whole in the *Borden* suit.

Appellant's brief cites no case where judicial reshaping of a statute has been carried so far. We have examined the cases cited, particularly those under appellant's Point II. The four Wisconsin cases cited on page 50 all held statutes to be constitutional, and are

relevant only for dictum. The other cases held statutes unconstitutional because of unreasonable classifications, and in some of them the offending classification was of time, between persons in business or facilities in use on a certain date and new persons or facilities. In no one of them, however, did the Court proceed from a decision that the distinction was unreasonable and invalid, to a conclusion that the statute was in all other respects valid and that new and old should be treated alike under the statute for purposes of licensing or other statutory treatment. The contrary conclusion, that the statute was completely invalid, was reached in all the cases, usually without discussion. *Nichols v. Walter,* 37 Minn. 264, and *Hauser v. N. B. & Merc. Ins. Co.,* 206 N. Y. 455, 465, are cases where the question of separability was discussed, and in both cases the decision was that the statute was completely void.

The statute now under consideration contains a separability clause, but we do not understand that such a clause is conclusive upon all questions of separability. Such a clause is "but an aid to interpretation and not an inexorable command." *Dorchy v. Kansas,* 264 U. S. 286, 290; *Williams v. Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & L. Co. v. Pfost,* 286 U. S. 165, 184; *Champlin Rfg. Co. v. Commn.,* 286 U. S. 210, 235.

The general rule as to separability has been stated and applied many times. See, for examples, *Sprague v. Thompson,* 118 U. S. 90, 94-95; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 565; *Lynch v. United States,* 292 U. S. 571, 586. The rule applied by the

highest court of New York State is the same. *People ex rel. Alpha P. C. Co. v. Knapp,* 230 N. Y. 48, 60; *City Bank F. T. Co. v. N. Y. C. R. R. Co.,* 253 N. Y. 49, 55-57; *People v. Mancuso,* 255 N. Y. 463, 472-474.

The decision now involved was based by the State court upon a Federal ground. We believe that it could equally well have been based upon the non-Federal ground that the time provision is inseparable, and cannot be reversed effectively without deciding that the provision is separable. In opposition to jurisdiction, we urged that the Federal question was not necessary to the determination of the case (see *Arkansas Southern R. R. v. German Bank,* 207 U. S. 270, 275; *Fox Film Corp. v. A. B. Muller,* Dec. 9, 1935), but we now believe that this Court takes jurisdiction of the intermingled questions *(Enterprise Irrig. Dist. v. Canal Co.,* 243 U. S. 157), and will exercise its discretion as to whether to decide either or both of them. Conceivably it may decide the question of constitutionality and remit the question of separability to the state courts *(Dorchy v. Kansas,* 264 U. S. 286), or it may decide both questions *(Abie State Bank v. Bryan,* 282 U. S. 765, 773), or it may decide only that the provision is inseparable and hence that the appellant cannot be affected by any decision as to its constitutionality.

We respectfully submit that the course last mentioned is the correct one. Even if the time limitation is unconstitutional, appellant is not entitled to any relief in this proceeding. The court will not exercise "judicial surgery" for the purpose of extending to the appellant and other new dealers the benefit of the "unadvertised differential" provision.

FINALLY.

It is respectfully submitted that the judgment below should be affirmed.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,

HENRY EPSTEIN,
Solicitor General,

HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1935.

Mayflower Farms, Inc., Appellant,
vs.
Peter G. Ten Eyck, Commissioner of the Department of Agriculture and Markets of the State of New York, et al.

Appeal from the Supreme Court of the State of New York.

[February 10, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant is a corporation formed under the laws of New York, pursuing the business of a milk dealer in Brooklyn. It did not enter the business until the autumn of 1933, when it applied for, and was granted, a license under the Milk Control Act of March 31, 1933. The statute having been re-enacted for the year commencing April 1, 1934, the company, on April 16, 1934, sought a license under the new act. After a hearing the application was denied. ~~The Supreme Court granted a writ of certiorari, but upon~~ The Supreme Court granted a certiorari order, and upon that order and the return the Appellate Division confirmed the order of the Department of Agriculture and Markets refusing a license, and this action was affirmed by the Court of Appeals mum prices for sales of fluid milk in bottles by dealers to stores in cities of more than one million inhabitants, with a differential of one cent per quart in favor of dealers "not having a well advertised trade name."[2] The term of the act was one year. An amended act, effective April 1, 1934,[3] which placed milk control under the jurisdiction of a division of the Department of Agriculture and Markets, contained a similar provision with respect to the differential. The pertinent section, as it stood at the time of the appellant's application for a license, follows; the words in

[1] Laws of 1933 (N. Y.) Chap. 158. See *Nebbia* v. *New York*, 291 U. S. 502.

[2] *Ibid*, Section 317 (c).

[3] Laws of 1934 (N. Y.) Chap. 126.

brackets having been in the original act, but eliminated when the statute was revised in 1934, those in italics having been added by the later act:

"It shall not be unlawful for any milk dealer who [at the time this act shall take effect is] *since April tenth, nineteen hundred thirty-three has been* engaged *continuously* in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, *and such lower price shall also apply on sales from stores to consumers;* provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed [by the board] for such sales to stores in such a city."[4]

The appellant had not a well-advertised trade name. The reason for refusing it a license was that though it had not been continuously in the business of dealing in milk since April 10, 1933 it had sold and was selling to stores milk at a price a cent below the established minimum price. The question is whether the provision denying the benefit of the differential to all who embark in the business after April 10, 1933, works a discrimination which has no foundation in the circumstances of those engaging in the milk business in New York City, and is therefore so unreasonable as to deny appellant the equal protection of the laws in violation of the Fourteenth Amendment.

The record discloses no reason for the discrimination. The report of the committee, pursuant to which the Milk Control Act was adopted, is silent on the subject. While the legislative history indicates that the differential provision was intended to preserve competitive conditions affecting the store trade in milk, it affords no clue to the genesis of the clause denying the benefit of the differential to those entering the business after April 10, 1933.

The Court of Appeals thought a possible reason for the time limitation might be that, without it, the companies having well advertised names could, through subsidiaries, sell milk not bearing their names in competition with unadvertised dealers and thus drive some of the latter out of the field with consequent injury to the

[4] Laws of 1933 N. Y. Chap. 158, Section 317 (c); Article 21-A, Section 258 (q) of the Agriculture and Markets Law of the State of New York; Laws of 1934 (N. Y.) 580.

farmers who sell them milk. This view ignores the fact that the purchase price to the farmer is fixed and that the introduction of new unadvertised brands of bottled milk would not reduce the total demand for fluid milk in the metropolitan area. The appellees do not attempt now to support the provision on this ground.

Another suggested reason for the discrimination is that the legislature believed an equal price basis for all dealers would cause most of the business of selling milk through stores to pass into the hands of the large and well known dealers; the differential provision was designed to prevent this result, and save existing businesses of the independent dealers, but was limited in its scope by the reason for it; the legislature did not wish to increase the lower price competition against well advertised dealers by permitting new independent dealers to go into the business, and so required persons or corporations desiring to make investments in the milk business after April 10, 1933 to attach themselves to the higher price group. This is but another way of saying the legislature determined that during the life of the law no person or corporation might enter the business of a milk dealer in New York City. The very reason for the differential was the belief that no one could successfully market an unadvertised brand on an even price basis with the seller of a well advertised brand. One coming fresh into the field would not possess such a brand and clearly could not meet the competition of those having an established trade name and good will, unless he were allowed the same differential as others in his class. By denying him this advantage the law effectually barred him from the business.

We are referred to a host of decisions to the effect that a regulatory law may be prospective in operation and may except from its sweep those presently engaged in the calling or activity to which it is directed. Examples are statutes licensing physicians and dentists, which apply only to those entering the profession subsequent to the passage of the act and exempt those then in practice, or zoning laws which exempt existing buildings, or laws forbidding slaughter houses within certain areas, but excepting existing establishments. The challenged provision is unlike such laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business

at an arbitrary date as against all those who enter the industry after that date. The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed at any abuse, cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law.

At the argument we were asked to hold that if the time limitation be bad, it is severable, and the provision for the differential, shorn of it, remains in force; and we were referred to a section of the act claimed to show the legislature so intended. While we have jurisdiction to decide the question, it is one which may appropriately be left for adjudication by the courts of New York, *Dorchy* v. *Kansas*, 264 U. S. 286, 290, 291; *Fox Film Corporation* v. *Muller*, 296 U. S. —, ~~December 9, 1935, pp. 2, 3~~.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

207, 209, 210

SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1935.

Mayflower Farms, Inc., Appellant,
vs.
Peter G. Ten Eyck, Commissioner of Agriculture and Markets of the State of New York, and another, Appellees.

Appeal from the Supreme Court of the State of New York.

[February 10, 1936.]

Mr. Justice Cardozo, dissenting.

The judgment just announced is irreconcilable in principle with the judgment in Borden's case, No. 597, announced a minute or so earlier.

A minimum price for fluid milk was fixed by law in April, 1933. At that time, "independents" were underselling their competitors, the dealers in well-advertised brands, by approximately a cent a quart. There was reason to believe that unless that differential was preserved, they would be driven out of business. To give them an opportunity to survive, the lawmakers maintained the differential in the City of New York, the field of keenest competition. We have learned from the opinion in Borden's case that this might lawfully be done.

The problem was then forced upon the lawmakers, what were to be the privileges of independents who came upon the scene thereafter? Were they to have the benefit of a differential though they had not invested a dollar in the milk business at the passage of the act, or were they to take the chances of defeat by rivals stronger than themselves, as they would have to do in other callings? "The Fourteenth Amendment does not protect a business against the hazards of competition." *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170; *Public Service Comm.* v. *Great Northern Utilities Co.*, 289 U. S. 130, 135. To concede the differential to newcomers might mean an indefinite extension of an artificial preference, thereby aggravating the handicap, the factitious barrier to expansion, for owners of established brands. There was danger that the preference would become so general as to occupy an unfair proportion of the field, the statutory norm being thus disrupted

altogether. On the other hand, to refuse the differential might mean that newcomers would be deterred from putting capital and labor at the risk of such a business, and, even if they chose to do so, would wage a losing fight.

Hardships, great or little, were inevitable, whether the field of the differential was narrowed or enlarged. The legislature, and not the court, has been charged with the duty of determining their comparative extent. To some minds an expansion of the field might seem the course of wisdom and even that of duty; to others wisdom and duty might seem to point the other way. The judicial function is discharged when it appears from a survey of the scene that the lawmakers did not play the part of arbitrary despots in choosing as they did. *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 586, 587. When a line or point has to be fixed, and "there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Holmes, J., in *Louisville Gas and Electric Co.* v. *Coleman*, 277 U. S. 32, 41. Cf. *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268, 269. The judgment of the court commits us to a larger rôle. In declaring the equities of newcomers to be not inferior to those of others, the judgment makes a choice between competing considerations of policy and fairness, however emphatic its professions that it applies a rule of law.

For the situation was one to tax the wisdom of the wisest. At the very least it was a situation where thoughtful and honest men might see their duty differently. The statute upheld by this court in *Nebbia* v. *New York*, 291 U. S. 502, was an experiment, and a novel one, in that form of business enterprise. Relations between groups had grown up and crystallized under cover of the regime of unrestricted competition. They were threatened with disruption by a system of regulated prices which might crowd the little dealers out and leave the strong and the rich in possession of the field. If there was to be dislocation of the price structure by the action of the state, there was a duty, or so the lawmakers might believe, to spread the consequences among the groups with a minimum of change and hence a minimum of hardship. But the position of men in business at the beginning of the change was very different from those who might go into the business afterwards. Those already there would lose something more than an opportunity for a choice between one business and another. They would lose capital already

ventured; they would lose experience already bought; they would suffer the pains incidental to the sudden and enforced abandonment of an accustomed way of life. A newcomer could not pretend that he was exposed to those afflictions. Then, too, the ephemeral character of the project counted heavily in favor of the older dealers, and little in favor of a newcomer, or rather, indeed, against him. The system of regulation had been set up as a temporary one, to tide producers over the rigors of the great depression. If independents already in the field could have their business saved from ruin, it might come back to them intact when the statute was no longer needed. Those who went into the system later would have to count the cost.

Considerations akin to these have seemed sufficient to other legislatures for drawing a distinction between an old business and a new one. They have seemed sufficient to this court in determining the validity of other acts of legislation not different in principle. *Stanley* v. *Utilities Comm. of Maine*, 295 U. S. 76, 78; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 370, 371; *Sperry & Hutchinson Co.* v. *Rhodes*, 220 U. S. 502, 505; *Watson* v. *Maryland*, 218 U. S. 173, 177, 178; cf. *Spector* v. *Building Inspector*, 250 Mass. 63, 70, 71. Independents who were in business when the statute was adopted would not have suffered a denial of a constitutional right or privilege if they had been refused a differential, though the refusal might have condemned them to a foreordained and hopeless struggle with advertised competitors stronger than themselves. For the same reason, independents starting afterwards must submit to the same chances unless their equities are as commanding as those of dealers on the scene before. It is juggling with words to say that all the independents make up a single "class", and by reason of that fact must be subjected to a single rule. Whether the class is divisible into subclasses is the very question to be answered. There may be division and subdivision unless separation can be found to be so void of rationality as to be the expression of a whim rather than an exercise of judgment. "We have no right", it is now said, "to conjure up possible situations which might justify the discrimination." The court has taught a different doctrine in its earlier decisions. "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

Metropolitan Casualty Insurance Co. v. *Brownell*, 294 U. S. 580, 584; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357; *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257; *Williams* v. *Mayor*, 289 U. S. 36, 42. On this occasion, happily, the facts are not obscure. Big dealers and little ones, newcomers in the trade and veterans, were clamorously asserting to the legislature their title to its favor. I have not seen the judicial scales so delicately poised and so accurately graduated as to balance and record the subtleties of all these rival equities, and make them ponderable and legible beyond a reasonable doubt.

To say that the statute is not void beyond a reasonable doubt is to say that it is valid.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.